Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION, for the use and benefit of LIBERTY MUTUAL INSURANCE COMPANY,
Respondent,

and

OLD REPUBLIC INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JAMES L. SANDERLIN,
ALEXANDER H. SLAUGHTER,
ROBERT E. PAYNE,
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
Attorneys for Petitioner,
Pitt County Transportation Company

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Petitioner, Pitt County Transportation Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 21, 1974.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia is reported at 358 F. Supp. 1177 and is set forth in the Appendix at pp. 11a-19a.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 492 F.2d 243 and is set forth in the Appendix at pp. 1a-9a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on February 21, 1974. A copy of the judgment is set forth in the Appendix at p. 10a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the provisions of a so-called "trip lease" of a tractor-trailer unit between the Unit's owner and an interstate carrier regulated by the Interstate Commerce Commission (ICC) purporting to obligate the owner to "indemnify" the interstate carrier for the negligence of the owner and his employees and the driver are unenforceable as violative of applicable federal law, 49 U.S.C. §304, *et seq.*, and the regulations of the Interstate Commerce Commission, 49 C.F.R. §1057.4, issued pursuant thereto?

(a) Whether the driver of the tractor-trailer unit becomes the agent of the lessee while operating the unit on its behalf or remains the agent of the owner?

(b) Whether, if the driver is considered the agent of the lessee, the "indemnity" provisions of the lease are illegal and void as an attempt by the lessee to impose liability on the owner for the lessee's own negligence?

(c) Whether, if the driver is considered the agent of the owner, the "indemnity" provisions are unenforceable as violative of applicable federal regulations, 49 C.F.R. §1057.4?

(d) Whether, the "indemnity" provisions should be declared unenforceable irrespective of the circumstances under which they might be invoked since they circumvent the intent of Congress and the Interstate Commerce Commission to compel regulated, interstate carriers to assume responsibility, in fact as well as in law, to insure the use of sound equipment and healthy and skillful drivers?

STATUTES AND REGULATIONS INVOLVED

The applicable statutes in this action are 49 U.S.C. §304(a)(3) and (e). Those sections of the statute are set forth verbatim in the Appendix at pp. 26a-27a. These subsections of the statute may be found in Vol. 10, United States Code, at pp. 11940 and 11942 respectively (1970 ed.).

The applicable federal regulations in this action are 49 C.F.R. §1057.4. The regulations are set forth verbatim in the Appendix at pp. 27a-34a. The regulations may be found in Vol. 32 Federal Register 20056, December 20, 1967, as amended at Vol. 33 Federal Register 2848, February 10, 1968.

STATEMENT

Carolina Freight Carriers Corporation is an interstate motor vehicle carrier regulated by the Interstate Commerce Commission. Pitt County Transportation Company is an intrastate carrier. Carolina Freight leased a 1963 International tractor-trailer unit from Pitt pursuant to a lease denoted a "Motor Vehicle Trip Lease Agreement."[1] This form agreement was prepared and printed by Carolina Freight and by its terms that company ostensibly took "exclusive possession, control and use" of, and assumed complete responsibility in respect to, the tractor-trailer. The lease commenced on June 19, 1969 but contained no expiration date.

As required by the applicable Interstate Commerce Commission (ICC) regulations, styled "Augmenting Equipment," 49 C.F.R. §1057.4, Carolina Freight accepted the equipment in writing on the lease form. 49 C.F.R. §1057.4(b). Ira Jay Pugh, the driver, supplied by Pitt as required by the lease, signed the lease on Carolina Freight's behalf.

The lease undertook to further allocate the responsibilities of the parties. Under the "Terms and Conditions" the lessor, Pitt, agreed to service the equipment, to pay any fines arising out of its operation, to make sure all applicable regulations were complied with and take care of all wages, taxes, insurance premiums and so forth paid to, or on account of, the driver or his helpers. In spite of its blanket assumption of responsibility for the equipment in

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[1] The "trip lease" is set out in the Appendix at pp. 24a-25a. It is referred to hereafter as the lease.

the beginning of the lease [as required by 49 C.F.R. §1057.4-(a)(4)], the lessee, Carolina Freight, in paragraph 5 of the Terms and Conditions takes only such control as required by the rules and regulations of the Interstate Commerce Commission, and "for the limited purpose of safety to the public and safe delivery of shipment." Nevertheless, Carolina Freight assumed the status of "owner" for purposes of subleasing (Terms and Conditions, ¶ 1) as permitted by 49 C.F.R. §1057.4(a)(4)(i). In paragraph 2, Carolina Freight did agree to pay all costs of public liability and property damage insurance while the equipment was being operated in its behalf. However,

> "in the event any loss or damage to cargo or property damage or personal injury to any third person takes place by reason of negligence or dishonesty of the owner, its agents, servants or employees, then the owner does hereby agree to assume and be fully responsible for any such damage and, in the event payment shall be made by the lessee herein, Lessor does hereby agree to indemnify the Lessee and hold the Lessee harmless for any and all claims. In the event that Lessee's insurance company is required to make payment therefor, then, and in that event, the insurance company shall be subrogated to the rights of the Lessee against the Lessor herein," Terms and Conditions, ¶ 2.

The lessor, Pitt, also agreed during the term of the lease "to indemnify LESSEE against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers." Terms and Conditions, ¶ 9.

The compensation to Pitt for the rental of the equipment, inclusive of the driver's salary, was $469.80. This

was stated in the lease as required by 49 C.F.R. §1057.4-(a)(5).

Pugh picked up his load in New York City and began the trip to Pampano Beach, Florida as required by the lease. According to the initial pleading, Pugh negligently allowed the truck to roll backwards into a little girl and her father who had walked behind him and stopped there.[2] These events occurred in a rest-stop, parking lot off of Interstate 95 in Caroline County, Virginia. Liberty Mutual Insurance Company, Carolina Freight's insurer, settled the resulting claims for $50,000. Liberty Mutual brought an action in the Circuit Court of Caroline County in the name of Carolina Freight for the use and benefit of Liberty Mutual against Pitt for the amount of the settlement.

Liberty's action was straightforward. It alleged the lease, the indemnity provisions thereof, Pugh's negligence, the accident, the claims and their resolution. It also alleged that Pugh was Pitt's "agent, servant, and employee."

Alleging diversity of citizenship within the meaning of 28 U.S.C. §1441(a) and 28 U.S.C. §1332, Pitt removed the case to the United States District Court for the Eastern District of Virginia, at Richmond, under 28 U.S.C. §1446. (Pitt is only a citizen of North Carolina and Liberty Mutual, the real party in interest on the plaintiff's side, is neither incorporated nor does it have a principal place of business in that state. In addition, the central issue here involves the

[2] Pitt denies that Pugh was negligent but that issue is not before this Court.

interpretation of a federal regulation so that jurisdiction is also present pursuant to 28 U.S.C. §1441(b)). Pitt then filed an answer and a third-party complaint against Old Republic Insurance Company, its public liability carrier who had denied any obligation to it on the ground that Pitt's liability, if any, arose from a contractural obligation not covered by Old Republic's policy. Pitt moved for judgment on the pleadings against Carolina Freight. The District Court held that the indemnity provisions of the lease violated applicable Interstate Commerce Commission regulations and, treating the motion as one for summary judgment, granted it. 358 F. Supp. 1177 (E.D. Va., 1973). The District Court relied on *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972).

On appeal the Fourth Circuit, finding nothing illegal in the trip lease arrangement between Pitt and Carolina Freight, comforted by North Carolina cases approving indemnity provisions under similar circumstances and finding support from the Fifth Circuit in *Allstate Insur. Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972), reversed and remanded.

Pitt seeks reversal of that judgment.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed (1) because it involves a substantial question of the application of federal regulations promulgated pursuant to a federal statute governing interstate commerce and (2) because it is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *Alford v. Major*, 470 F.2d 132 (1972), which applied the same regulations to almost identical facts and reached the opposite result.

I

The indemnity provisions of the lease between Carolina Freight and Pitt, when invoked as a result of an act of negligence on the part of the driver, are in conflict with applicable Interstate Commerce Commission regulations and therefore unenforceable.

The Fourth Circuit's decision is predicated on the assumption that the trip lease is not facially violative of applicable ICC regulations. Moreover, because the lease ostensibly obligated Carolina Freight to assume complete responsibility in respect to the leased equipment, the court assumed that the ICC regulations had been fully complied with. An examination of the terms of the lease demonstrates that both assumptions are clearly erroneous. An analysis of the Fourth Circuit's decision in terms of the driver's status illustrates why.

This case involves one alleged negligent act on the part of the driver leased by Pitt (the Lessor) to operate the tractor-trailer unit for Carolina Freight (the Lessee). One act of driver negligence also gave rise to *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972) *affirming* 314 F. Supp. 979 (N.D. Ind., 1970) and *Allstate Insur. Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972). In none of these three cases was there any allegation that the driver was incompetent to perform his assigned task or that the lessor had been negligent in selecting him.

The driver (here Pugh), in fact and in law, must become the lessee's agent when he is provided along with the leased equipment. Pursuant to 49 C.F.R. §1057.4(e), Carolina Freight, the lessee is required to make certain that the driver is qualified and familiar with applicable law and

safety standards. In fact, both Pugh and Carolina Freight must have regarded Pugh as Carolina Freight's agent since he signed the lease on behalf of Carolina Freight in accepting the equipment from Pitt.

If Pugh is Carolina Freight's agent, the indemnity provisions would constitute a contract exempting Carolina Freight from the consequences of its own negligence. Such a contract made by a common carrier is clearly illegal even under North Carolina law. *Jordan v. Eastern Transit & Storage Co.*, 266 N.C. 156, 146 S.E.2d 43 (1966); *Singleton v. Atlantic Coastline RR*, 203 N.C. 462, 166 S.E. 305 (1932); see 41 Am. Jur.2d, *Indemnity*, §§15,16. In fact, the District Court in *Alford v. Major, supra*, citing the Restatement of Contracts §575 (1932), said that such an agreement would be illegal where one of the parties is charged with a duty of public service. 314 F. Supp. 979, 982.

Also, if Pugh were Carolina Freight's agent, paragraph 2 of the Terms and Conditions of the lease would not apply since that paragraph only obligates Pitt to indemnify Carolina by reason of the negligence of the "owner," its agents, servants, or employees. There is no allegation that anyone other than Pugh was negligent. Therefore, any claim to indemnity must be under paragraph 5 which makes the lessor liable to indemnify the lessee for loss occasioned by the "driver's" negligence.

Thus, if Pugh is regarded as Carolina Freight's agent, paragraph 5 simply operates to make Pitt Carolina Freight's liability insurer. Even assuming the $469.80 Pitt was paid includes a "premium" for such "insurance," that result would amount to a blatant violation of the ICC regulations because recompense of injured members of the public must then be measured by Pitt's ability to insure. This is clearly

contrary to one of the two basic purposes of 49 U.S.C. §§304(a)(3) and (e) and 49 C.F.R. §1057.4. *American Trucking Assoc. v. United States*, 344 U.S. 298, 305 (1953); *Alford v. Major*, 470 F.2d 132, 134-35 (7th Cir. 1972). Indeed, if Pitt becomes Carolina Freight's insurer, the trip lease situation is exactly as it was before passage of the Motor Carriers Act. In other words, the lease here creates the very conditions which Congress sought to eliminate more than twenty-five years ago. Moreover, Pitt is obviously not a qualified insurer and its own carrier has denied coverage for any liability arising under the trip lease.

On the other hand, if Pugh is Pitt's agent, the lease provides for *prima facie* violations of the ICC regulations.

The Fourth Circuit's decision completely overlooks this issue when it assumes that the trip lease is not facially violative of the ICC regulations. By so doing, it necessarily approves the North Carolina decisions which analyze the problem in the following way:

> "In the instant case, the owner's regular driver was in charge of the Transit Company's truck, and in reality of course the only thing that the franchise carrier did was to tell him where to go and what to bring or carry. And the duty imposed by law with respect to third parties in no way interfered with the right of the lessor to agree to indemnify the lessee for any loss it might sustain as a result of the negligence, incompetence or dishonesty of any driver which the lessor might furnish to operate the leased truck." *Newsome v. Surratt*, 237 N.C. 297, 74 S.E.2d 732, 736 (1953).

See *S&N Freight Line, Inc. v. Bundy Truck Lines, Inc.*, 3 N.C. App. 1, 164 S.E.2d 89 (1968); *cf. Watkins v. Murrow*, 253 N.C. 652, 118 S.E.2d 5 (1961).

If this case presented only an issue of state law these decisions would be compelling. However, it presents a federal question to be answered by federal law. *Alford v. Major, supra; Woolfolk v. Brown*, 456 F.2d 652 (4th Cir. 1972).

If Pugh remained Pitt's agent the whole arrangement flies in the teeth of the applicable ICC regulations. According to those regulations, the lease "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,***." 49 C.F.R. §1057.4(a)(4). Further, "before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and this his employment as a driver will not result in violation of, any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation." 49 C.F.R. §1057.4(e). In this case Carolina is the authorized carrier. Any attempt to escape its federally imposed duties, as in the lease here involved, must be ineffective.

This analysis is implicit in the Seventh Circuit's opinion in *Alford v. Major, supra*. In the District Court, counsel for the lessee, realizing that he could not enforce the indemnity provision if the driver was his client's employee, maintained that he had "really" remained the lessor's agent. *Alford v. Major*, 314 F. Supp. 979, 982 (N.D. Ind., 1970). If such were the actual circumstances they amounted

to a "*prima facie*" violation of the pertinent ICC regulations. Insofar as the District Court and the Seventh Circuit were concerned, such a *prima facie* violation tainted the whole arrangement and rendered the indemnity provisions unenforceable. *Alford v. Major,* 470 F.2d 132 (7th Cir. 1972). Even the Fourth and Fifth Circuits imply they might have held differently if they had found such a *prima facie* violation. See *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.,* 492 F.2d 243, 246 (4th Cir. 1974); *Allstate Insur. Co. v. Alterman Transport Lines, Inc.,* 465 F.2d 710, 713-714 (5th Cir. 1972); *cf. Carriers Insur. Exch. v. Truck Insur. Exch.,* 310 F.2d 653 (4th Cir. 1962). Strangely, the Fourth Circuit in this case failed to recognize that Carolina Freight's allegation that Pugh remained Pitt's agent is, in reality, a concession of such a "*prima facie*" violation. There is no difference between saying that the lessor retains control of the driver as in *Major* and the allegation by Carolina Freight here that the driver at the time of the accident was the lessor's "agent, servant, and employee."

The foregoing assumes for purposes of argument that the indemnity provisions are valid where the lessor, or those legitimately his agents, cause, by their fault, the lessee damage. For instance, the lease puts the burden on the lessor to keep the equipment in good repair. If the brakes fail by reason of the lessor's negligence in maintaining the equipment, and an accident results, arguably the lessee should not be precluded from going back against the lessor. There is nothing in the regulations which preclude the lessee from looking to outsiders to do mechanical or repair work. See *Allstate Insur. Co. v. Alterman Transport Lines, Inc., supra,* at 713. There is nothing precluding the lessee from looking to the lessor for this purpose. The key element is that the authorized carrier

takes the responsibility and fulfils his obligations to the public. If he pursues the lessor under these circumstances he is simply seeking reimbursement for loss caused him by the fault of another.

However, even if this approach is valid, it led the Fifth Circuit into error in the *Alterman* case and the Fourth Circuit into error here. The Fifth Circuit points out at length that the equipment there involved was turned over to the lessee and the lessee performed the required mechanical inspections on it. 465 F.2d 710, 712-14. In view of this proof of the lessee's diligence, the Court held that there had been no "*prima facie*" violation of applicable ICC regulations as in *Major.* Then, without considering the status of the driver at all (even though the accident had resulted solely from his one act of negligence) it deemed the indemnity provisions valid. The Fourth Circuit simply followed the Fifth Circuit. *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.,* 492 F.2d 243, 246 (4th Cir. 1974).

Stated simply, the Fourth Circuit's decision is wrong if it proceeds under the premise that Pugh was Carolina Freight's agent because the indemnity clause becomes a contractual clause exempting Carolina Freight from the consequences of its own negligence. This is clearly violative of even the public policy of North Carolina where a common carrier is involved. Moreover, the Fourth Circuit's decision is wrong if it proceeds on the premise that Pugh was Pitt's agent because if that is true the trip lease is facially violative of the federal regulations.

Pitt urges that this dilemma permits no escape. Pugh was not a hybrid. He was Pitt's employee at the time of the accident or he was Carolina Freight's. Either way the indemnity provisions of the lease are unenforceable.

II

The indemnity provisions of the lease should be declared unenforceable under all circumstances.

The Fourth Circuit's decision proceeds from the premise that the only purpose of the ICC regulations is to present to injured members of the public a large (and insured) defendant. The Fourth Circuit in the instant case, the Fifth Circuit in *Alterman, supra,* and the North Carolina courts look to whether the public is thus superficially protected and if so, the parties to the lease are allowed to place the ultimate loss on the lessor. *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, 492 F.2d 243, 256 (4th Cir. 1974); *Allstate Ins. Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972); *Newsome v. Surratt*, 237 N.C. 297, 74 S.E.2d 732, 736 (1953); *S&N Freight Line, Inc. v. Bundy Truck Lines, Inc.*, 3 N.C. App. 1, 164 S.E.2d 89 (1968). *But see, Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W.2d 368, 370 (1973); *cf. Carriers Ins. Exch. v. Truck Ins. Exch.*, 310 F.2d 653 (4th Cir. 1972).

Large, regulated carriers have supplemented their equipment for many years by leasing. Prior to 1948 problems with the practice had become apparent. This Court described many of these in *American Trucking Assoc. v. United States*, 344 U.S. 298, 305 (1953):

> "Because of the fact that the great bulk of the arrangements cover only one trip, leasing carriers have little opportunity or desire to inspect the equipment used, especially in cases where the agreement is made without the operator's appearance at the carrier's terminal. Enforcement sanctions by the carriers for violations would be

> clearly as difficult to impose as route standards. Hence, the carrier may not extend the supervision of rest periods, doctors' certificates, brakes, lights, tires, steering equipment and loading, normally accorded his own employees and vehicles, to equipment and drivers secured through lease. And the owner-operator himself is called upon to push himself and his truck because of the economic impact of time spent off the road and investment in repairs on his slim profit margin. Further, the absence of written agreements, has made the fixing of the lessee's responsibility for accidents highly difficult."

See, *e.g., Simmons v. King*, 478 F.2d 857, 866 (5th Cir. 1973); *Alford v. Major*, 470 F.2d 133 (7th Cir. 1972).

Pursuant to the Motor Carrier Act of 1935, 49 Stat. 543, as amended, 54 Stat. 919, 49 U.S.C. §§301, *et seq.*, the Interstate Commerce Commission issued regulations to control the abuses. Specifically, the Commission was authorized in 49 U.S.C. §304(e) to do the following:

> "Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property –
>
> (1) regulations requiring that any such lease, contract or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or

other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation, thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

Among the regulations so issued were those dealing with "Augmenting Equipment" now found in 49 C.F.R. §1057.4.

The basic purpose of these regulations was to put the entire onus of supervising leased equipment and borrowed operators upon the regulated carriers. There were several reasons for doing this. As mentioned previously, one reason was to assure that a regulated and hence adequately insured carrier was available to respond in damages, where appropriate, to injured members of the public. But this was not the only reason.

A purpose of co-equal significance was to insure highway safety by requiring the licensed carriers to be responsible, in fact and in law, for the supervision of borrowed drivers and the maintenance of leased equipment. The Seventh Circuit realized this when it decided *Alford v. Major, supra,* in the following statement:

We agree with the district court that Major has misunderstood the policy behind these regulations. While it is true that one of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public, this was certainly not the exclusive purpose of the regulatory scheme. Indeed, highway safety must be considered to have been one of the paramount goals. As we have seen the regulations call for the inspection of non-owned equipment by the authorized carrier when he takes possession as well as the testing of the driver's familiarity with various federal highway safety regulations. Thus, as the district court held, "*the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.*" 470 F.2d 132 at 135. (Emphasis added).

Moreover, that court specifically rejected the "practicalities of the situation" argument urged by Carolina in this case and implicitly supported by the Fourth Circuit's decision. The court correctly observed:

> Major's argument of course, proceeds from the premise that the actual care, custody and control of the truck remained with the lessor through its driver during the period of the trip lease. Major's related suggestion that the regulations have tacitly acknowledged the practicalities of this situation runs counter to the principal thrust of those regulations. When carefully analyzed, Major's argument would permit the "practicalities" to

> override one of the central purposes of the regulations; namely, the prevention of traffic accidents from interstate truck leasing operations. *Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable.* (Emphasis added). 470 F.2d 132 at 135.

Obviously, it is much more desirable to prevent injuries by keeping the equipment sound and the driver healthy and skilled in his job than to simply assure recovery after injury. The ICC has no way to assure this state of affairs except by putting the burden on the entity it regulates. This it has done by the cited regulations.

By the terms of the lease in this case, Carolina Freight delegated back to Pitt all care and maintenance of the equipment except its inspection. If it should be allowed to call on Pitt for indemnification for any reason, it will have escaped the effect of the regulations altogether. Their purpose will have been utterly frustrated. The pressure on the regulated carrier to make sure it has sound equipment and a competent driver is relieved.

It is no answer to this argument to say that indemnification is equivalent to having insurance. (See *Allstate Ins. Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710, 713 (5th Cir. 1972) where the Court said that "the only conceivable argument against such an arrangement [the so-called indemnification clause] would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing it does not have to pay damages, might tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same

can be said of insurance coverage which the regulations obviously do not prohibit.") The insurance industry knows how to make careless motorists of all kinds pay dearly for their carelessness. Thousands of people are employed to keep track of the cost of each risk and get it passed on to the insured. The typical "lessor" obviously cannot be so accurate. He signs the lease the regulated carrier provides him, buys insurance which (according to Pitt's insurer here) does not cover him when he has leased out his equipment and takes his chances. So does the public.

CONCLUSION

Petitioner respectfully submits that this Court should hear this case because there is a conflict among the United States Circuit Courts of Appeal. *Compare, Alford v. Major,* 470 F.2d 132 (7th Cir. 1972), *affirming,* 314 F. Supp. 979 (N.D. Ind., 1970), *with Carolina Freight Carriers Corp. v. Pitt County Transportation Co.,* 492 F.2d 243, 246 (4th Cir. 1974), *and Allstate Insur. Co. v. Alterman Transport Lines, Inc.,* 465 F.2d 710 (5th Cir. 1972). See also, *Simmons v. King,* 478 F.2d 857, 867 (5th Cir. 1973).

Federal law controls the resolution of the problem. Provisions for indemnity similar to those Pitt here attacks are common in leases throughout the United States. Rules of law governing their enforceability should be uniform.

The uncertainty in this area was recently illustrated by the Supreme Court of Nebraska in a case almost identical to the one before this Court. As a preclude to its discussion of *Alford v. Major, supra,* and *Allstate Insur. Co. v. Alterman Transport Lines, Inc., supra,* the Court commented that "there are two lines of authority on the specific issue with which we are confronted. They are

represented by two federal cases, both decided in 1972. The two cases reach almost diametrically opposite results." *Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W.2d 368, 370 (1973).

The court, wisely in petitioner's view, chose to follow *Alford*. In any event, the issue should be decided once and for all by this Court. Accordingly, petitioner respectfully urges this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

/s/ JAMES L. SANDERLIN

JAMES L. SANDERLIN,
ALEXANDER H. SLAUGHTER,
ROBERT E. PAYNE,

McGUIRE, WOODS, and BATTLE
1400 Ross Building
Richmond, Virginia 23219

Attorneys for Petitioner,
Pitt County Transportation Company

APPENDIX

APPENDIX A

CAROLINA FREIGHT CARRIERS CORPORATION
for the Use and Benefit of Liberty Mutual Insurance Company,

Appellant,

v.

PITT COUNTY TRANSPORTATION COMPANY
and Old Republic Insurance Company,

Appellees.

No. 73-1812

United States Court of Appeals,
Fourth Circuit.
Argued Nov. 8, 1973.
Decided Feb. 21, 1974.

* * * * *

Before WINTER, BUTZNER and FIELD, Circuit Judges.

FIELD, Circuit Judge:

Finding an indemnification provision in a lease of motor carrier equipment to be violative of a pertinent regulation of the Interstate Commerce Commission, the district court granted defendant's motion for judgment on the pleadings and the plaintiff has appealed.

The facts are not in dispute. Carolina Freight Carriers Corporation [Carolina] leased a tractor-trailer truck accompanied by its driver from Pitt County Transportation Company [Pitt]. During the rental period the driver allegedly parked improperly on a highway wayside and the truck moved backwards striking one Robert Powers and his infant daughter. The infant was killed and Powers was seriously injured. Thereafter, Carolina's insurer compromised the claims by payment of $50,000, and Carolina

now seeks indemnity on behalf of its insurer from Pitt, the lessor.[1]

The issue presented to the court below was whether Pitt owed a duty to indemnify Carolina under the provisions of the lease, a copy of which was incorporated in the complaint as an exhibit thereto and which reads in pertinent part as follows:

> Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Co., Lessor, of Farmville, North Carolina *** for its exclusive possession, control, and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Agreement, the following vehicular equipment to be used by said lessee beginning at 1 PM o'clock on 6/19/69 in its interstate service to transport merchandise.
>
> * * * * *
>
> 2. LESSEE will assume and pay all costs of public liability and property damage insurance on the vehicle while operating at the direction of the Lessee and provide insurance covering cargo being transported at the direction of the Lessee. *However, in the event any loss or damage to cargo or property damage or personal injury to any third person takes place by reason of negligence or dishonesty of the owner, its Agents, servants, or employees, then the owner does*

[1] For the purpose of clarity, this opinion will refer to the parties as "Carolina" and "Pitt."

> *hereby agree to assume and be fully responsible for any such damage and, in the event payment shall be made by the Lessee herein, Lessor does hereby agree to indemnify the Lessee and hold the Lessee harmless for any and all claims. In the event that Lessee's insurance company is required to make payment therefor, then, and in that event, the insurance company shall be subrogated to the rights of the Lessee against the Lessor herein.*
>
> 5. LESSOR agrees that during the term of this lease *the motor vehicle equipment described above shall be under such control of the LESSEE as required by the rules and regulation of the Interstate Commerce Commission* and for the limited purpose of safety to the public and safe delivery of shipment.
>
> * * * * *
>
> 7. LESSOR agrees to be fully responsible for the above described equipment maintaining said equipment in accordance with the "safety" regulations and specifications set forth by the Interstate Commerce Commission to keep said equipment in good operating condition and appearance; to maintain such records as shall be required by the Interstate Commerce Commission, Government, State, or any other regulatory authority. LESSOR agrees to provide at his sole and own expense all necessary oil, gasoline, fuel, tires, repairs, accessories, and/or other

items required for the operation and maintenance of said vehicle during the term of this lease. LESSEE may require LESSOR to store his equipment when not in use on the LESSEE'S premises.

* * * * *

9. LESSOR agrees that during the term of this lease:

(a) He will be solely responsible for the payment of his own Social Security Taxes, Old Age Benefits, Unemployment Compensation, Taxes, Workmen's Compensation Insurance, Federal Income Taxes, license fees, and payment of all payroll deductions and taxes for employees furnished by the LESSOR.

(b) To pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease are to be borne by and be the sole responsibility of the LESSOR.

(c) *To indemnify LESSEE against loss or liability, if any resulting from the inquiry or death of the driver or drivers of the vehicle above described or any helpers employed by such drivers in connection with the loading or unloading of said vehicles.*

(d) *To indemnify LESSEE against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers.*

(e) To indemnify LESSEE against any loss or damage to or destruction of the trailer or other such equipment of the LESSEE towed by the LESSOR or his employee.

(f) To indemnifv the LESSEE against any loss resulting from claims brought against the LESSEE for any property damage and bodily injury sustained by the public while the tractor is detached from a trailer.

* * * * *

11. The LESSOR shall perform this contract in a safe, competent and workmanlike manner and shall be responsible to the LESSEE for complying and together with his employees, agents and servants shall comply with all applicable requirements of federal, state and local government including but not limited to the rules and regulations of the Interstate Commerce Commission.

12. The LESSOR shall at its expense employ all necessary drivers, driver's helpers, and laborers who shall be experienced, competent, and qualified to carry out work to be performed by the LESSOR under this contract. Such employees shall also be qualified under and meet all the requirements of applicable federal and state laws and municipal ordinance and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

* * * * *

18. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing and signed by both parties. *This agreement shall be governed by the laws of the State of North Carolina.* This Motor Vehicle Equipment Lease supercedes and cancels all prior agreements and leases entered into by the parties.

(Emphasis supplied).

In its answer to the complaint Pitt did not dispute the execution or terms of the lease agreement, but alleged that the provisions with respect to indemnification and the responsibility of Pitt are unenforceable since they are contrary to the regulations of the Interstate Commerce Commission. The relevant regulatory section, 49 C.F.R. §1057.4, reads:

"(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

* * * * *

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,***."

Although acknowledging that North Carolina law, designated as controlling in the agreement, recognizes the

validity of such an indemnification provision,[2] the district judge concluded that the effect of the provision was to relieve the lessee from responsibility for damages to third parties and, accordingly, it was "violative of the spirit and letter" of the federal regulation and therefore unenforceable.

In all deference, we think the district court misread the lease agreement for there is nothing in it which purports to relieve Carolina from any responsibility to third parties for damages resulting from the operation of the leased equipment. On the contrary, the agreement specifically provides that Carolina was taking exclusive possession and control of the equipment and assuming "complete responsibility in respect thereto." Recognizing the regulatory obligations, the instrument states that the equipment should be under "the control of the LESSEE as required by the rules and regulations of the Interstate Commerce Commission" for the purpose of safety to the public.

Nor do we find the indemnification provision violative of either the spirit or letter of the I.C.C. regulation. "The use of non-owned equipment by authorized carriers is not illegal, either under the Act or the rules under consideration," *American Trucking Assns. v. United States*, 344 U.S. 298, 303, 73 S.Ct. 307, 311, 97 L.Ed. 337 (1953), and the right of a carrier to augment its equipment by a lease arrangement such as we have before us is specifically

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[2] S & N Freight Line, Inc. v. Bundy Truck Lines, Inc., 3 N.C. App. 1, 164 S.E.2d 89 (1968); *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732 (1953).

authorized by statute, 49 U.S.C. §304(e), and the regulations, 49 C.F.R. 1057.1-1057.6.[3] While such lease arrangements must, of course, be in *bona fide* compliance with the regulations, which were promulgated primarily for the protection of the public, we agree with the Fifth Circuit that there is nothing in the language of the regulations "which would prohibit two freely contracting parties from determining, as between themselves, which party will ultimately bear the costs of damages done to a third person." *Allstate Insurance Co. v. Alterman Transport Lines, Inc.*, 465 F.2d 710, 713 (5 Cir. 1972).

In granting defendant's motion, the court below placed primary reliance on the case of *Alford v. Major*, 470 F.2d 132 (7 Cir. 1972). We, however, do not find *Major* persuasive for the reason, among others, that the lessee in that case conceded a *prima facie* violation of the regulation in that the lessor had, in fact, retained full custody and control over the truck and driver during the term of the lease. Nor is the conclusion we reach discordant with our decision in *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4 Cir. 1962), where at trial there was abundant evidence that the parties "used the written lease to give the appearance of compliance with the law while actually ignoring it, ***." The basis of that decision was succintly stated:

> "In short, the parties deliberately entered into a transaction in violation of the law and of the

---

[3] The operation of equipment incident to such a lease by a person other than a regular employee of the lessee is recognized and countenanced by 49 C.F.R. §1057.4(e).

> regulations which had been promulgated to insure the safe transportation of a dangerous substance for the protection of the general public." P. 657.

Since there is nothing in the indemnification provision facially violative of the Commission's regulations, it was error to grant defendant's motion for judgment on the pleadings. The judgment of the district court is reversed and the case remanded for further proceedings consistent herewith.

Reversed and remanded.

- - - - - - - - - - - - -

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1812

Carolina Freight Carriers Corporation
for the use and benefit of Liberty
Mutual Insurance Company,

Appellant,

versus

Pitt County Transportation Company;
Old Republic Insurance Company,

FILED: February 21, 1974 Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and the case remanded for further proceedings to the United States District Court for the Eastern District of Virginia, at Richmond, consistent with the opinion of this Court filed herewith.

/s/ William K. Slate
Clerk

COSTS FOR THE APPELLEES'

Cost of printing appellant's brief	$40.30
Costs of printing appellant's appendix	17.00
Docketing fee	25.00
Total costs	$82.30

APPENDIX C

CAROLINA FREIGHT CARRIERS CORP., etc.

v.

PITT COUNTY TRANSPORTATION CO.
Civ. A. No. 122–72.

United States District Court,
E. D. Virginia,
Richmond Division,
May 17, 1973.

* * * * *

MEMORANDUM

MERHIGE, District Judge.

Carolina Freight Carriers Corporation (Carolina) sues on behalf of its insurer to seek indemnity against Pitt County Transportation Co. (Pitt). This matter, brought originally in the Circuit Court of Caroline County, was removed to this Court pursuant to the removal statute, 28 U.S.C. §1446. Because there is proper diversity between the real plaintiff in interest (Carolina's insurer, Liberty Mutual Insurance Company, a Mass. Corp.) and Pitt, jurisdiction is properly attained by virtue of 28 U.S.C. §1441(a). Additionally, the central issue in this matter concerns interpretation of a federal regulation so that jurisdiction is proper as well pursuant to 28 U.S.C. §1441(b). The parties are presently before the Court pursuant to defendants' motion for judgment on the pleadings. Upon the memoranda and records before it, the Court finds this matter ripe for disposition.

The facts are not in dispute. Carolina leased a tractor-trailer truck accompanied by its driver from Pitt. During

the period of the rental, the driver allegedly parked improperly on a highway wayside. The truck moved backwards and collided with one Robert Powers and his infant daughter. The infant was killed and Powers injured. Liberty, Carolina's insurer, subsequently compromised the claims of the Powers against Carolina by payment of $50,000. Carolina, on behalf of Liberty, now seeks indemnity from Pitt, the lessor. Pitt has in turn filed a third-party complaint against its insurer, Old Republic Insurance Company, for indemnity. For purposes of this motion, Old Republic adopts the position taken by Pitt.

The precise issue, therefore, is whether Pitt owes a duty to indemnify Carolina. Because of an alleged conflict between the lease and federal regulations, the parties, unable to agree as to this question, have come before the Court.

Neither party disputes that the lease by its terms provides that the lessor (Pitt) shall indemnify the lessee (Carolina) for damages paid by the lessee to an injured third party. The lease reads in pertinent part as follows:

> Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Co., Lessor, of Farmville, North Carolina for its exclusive possession, control, and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Lease Agreement, the following vehicular equipment to be used by said lessee beginning at 1 PM o'clock on 6/19/69 in its interstate service to transport merchandise.
>
> . . . . .

2. LESSEE will assume and pay all costs of public liability and property damage insurance on the vehicle while operating at the direction of the Lessee and provide insurance covering cargo being transported at the direction of the Lessee. *However, in the event any loss or damage to cargo or property damage or persona! injury to any third person takes place by reason of negligence or dishonesty of the owner, its agents, servants, or employees, then the owner does hereby agree to assume and be fully responsible for any such damage and, in the event payment shall be made by the Lessee herein, Lessor does hereby agree to indemnify the Lessee and hold the Lessee harmless for any and all claims. In the event that Lessee's insurance company is required to make payment therefor, then, and in that event, the insurance company shall be subrogated to the rights of the Lessee against the Lessor herein.*

3. LESSOR agrees that the LESSEE shall withhold payment of any and all sums then or thereafter due the LESSOR to the extent of such expense and claims until the determination of such expense and valid claims which amount shall be deducted to the satisfaction thereof.

. . . . .

5. LESSOR agrees that during the term of this lease the motor vehicle equipment described above shall be under such control of the LESSEE as required by the rules and regulation

of the Interstate Commerce Commission, and for the limited purpose of safety to the public and safe delivery of shipment.

9. LESSOR agrees that during the term of this lease:

(a) He will be solely responsible for the payment of his own Social Security Taxes, Old Age Benefits, Unemployment Compensation Taxes, Workmen's Compensation Insurance, Federal Income Taxes, license fees, and payment of all payroll deductions and taxes for employees furnished by the LESSOR.

(b) To pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease are to be borne by and be the sole responsibility of the LESSOR.

(c) *To indemnify LESSEE against loss or liability, if any resulting from the injury or death of the driver or drivers of the vehicle above described or any helpers employed by such drivers in connection with the loading or unloading of said vehicles.*

(d) *To indemnify LESSEE against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers.*

(e) To indemnify LESSEE against any loss or damage to or destruction of the trailer or other

such equipment of the LESSEE towed by the LESSOR or his employee.

(f) To indemnify the LESSEE against any loss resulting from claims brought against the LESSEE for any property damage and bodily injury sustained by the public while the tractor is detached from a trailer.

11. The LESSOR shall perform this contract in a safe, competent and workmanlike manner and shall be responsible to the LESSEE for complying and together with his employees, agents, and servants shall comply with all applicable requirements of federal, state and local government including but not limited to the rules and regulations of the Interstate Commerce Commission.

12. The LESSOR shall at its expense employ all necessary drivers, driver's helpers, and laborers who shall be experienced, competent, and qualified to carry out work to be performed by the LESSOR under this contract. Such employees shall also be qualified under and meet all the requirements of applicable federal and state laws and municipal ordinance and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

18. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing

> and signed by both parties. *This agreement shall be governed by the laws of the State of North Carolina.* This Motor Vehicle Equipment Lease supercedes and cancels all prior agreements and leases entered into by the parties hereto. (Emphasis supplied.)

The federal regulations governing this type of arrangement (referred to as a "trip lease") provide, to the contrary, that the lessee shall under contract be responsible for damages to third parties. They read in pertinent part: (49 CFR §1057.4)

> (a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:
>
> (4) Exclusive possession and responsibilities. Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, [except: (i) Lessee may be considered as owner. Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.]

Pitt asserts that the aforecited provisions of the lease, which render it liable for indemnity, are violative of the spirit and letter of the above-quoted ICC regulation. Carolina, relying on several decisions of North Carolina law (which govern the substantive questions of contractual law by provision of the contract), asserts that the regulation

may properly be rendered inoperative by actual or contractual relationships between the parties which provide otherwise.

The first in the series of North Carolina cases relied upon, Newsome v. Surratt, 237 N.C. 297, 74 S.E.2d 732 (1953), held that the ICC policy in question would not govern where the actual relationship of the parties was such that the lessor operated the truck and the lessee did no more than to tell the lessor "where to go and what to carry." Similarly, S. & N. Freight Line, Inc. v. Bundy Truck Lines, Inc., 3 N.C.App. 1, 164 S.E.2d 89 (1968) noted that

> [W]hile exclusive control, management, and use of the vehicle was vested in the plaintiff for the purpose of meeting the requirements of the Interstate Commerce Commission, actual possession or custody thereof was retained by defendant Bundy [Lessor]. It was to be operated by one of his choosing and in the selection of whom plaintiff S & N [Lessee] had no part. Immediate supervision and control as to speed, manner of operation, hours of work, and the like necessarily remained with defendant Bundy. Hill v. Freight Carriers Corp., supra. These, we think, are the provisions of the agreement applicable and controlling here.

The Court is satisfied that this approach impliedly makes short shrift of the spirit and intent of the ICC regulation. The *Newsome* rationale has heretofore been expressly and firmly rejected by the Court of Appeals for the Seventh Circuit in Alford v. Major, et al., 470 F.2d 132 (7th Cir.

1972) which is closely on point. Major leased a truck and driver from one Carriers. Plaintiff's decedent was killed when his car was struck by a truck operated by the lessee, Major. Plaintiff sued both lessee and lessor, and upon cross-claim the lessee sought to enforce an indemnification clause in its trip lease, similar to that here, against the lessor. The District Court specifically rejected the *Newsome* approach, 314 F.Supp. 979, 983 (N.D. Ind. 1970), stating,

> In the opinion of this Court, the main purpose of the statute was to ensure that all interstate operations would be supervised directly by persons familiar with federal safety regulations and amenable to the jurisdiction of the Interstate Commerce Commission. In other words, the intent was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers. The Interstate Commerce Act was supposed to prevent accidents, as well as to provide financially responsible defendants in the event of their occurrence. And that end could best be achieved if the carriers themselves exerted actual control over leased equipment.

314 F.Supp. at 983. The Court of Appeals, 470 F.2d at 135, affirmed this interpretation.

The Court has little difficulty with this problem: This is not a matter involving an irresistible force against an immovable object. The Supremacy Clause of the constitution mandates otherwise. Woolfolk v. Brown, 456 F. 2d 652 (4th Cir. 1972). The ICC regulation appears mandatory on its face and under *Alford* is mandatory in

application. The lease provision relied on by Carolina is clearly violative of the regulation and therefore unenforceable as void. Accordingly Pitt's motion is well taken and judgment shall be granted for defendant on the pleadings.

An appropriate order shall issue.

* * * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CAROLINA FREIGHT CARRIERS CORP., etc.	:	
v.	:	CIVIL ACTION
PITT COUNTY TRANSPORTATION CO.	:	NO: 122-72-R

ORDER

In accordance with the memorandum of the Court this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that defendant's motion for summary judgment be, and the same is hereby, granted.

Let the Clerk send copies of the memorandum and this order to all counsel of record.

/s/ Robert R. Merhige
United States District Judge

Date: 5-17-73

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

C.A. No. 122-72-R

CAROLINA FREIGHT CARRIERS CORPORATION for the use and benefit of LIBERTY MUTUAL INSURANCE COMPANY,	Plaintiff,
v.	
PITT COUNTY TRANSPORTATION COMPANY,	Defendant and Third-Party Plaintiff,
v.	
OLD REPUBLIC INSURANCE COMPANY,	Third-Party Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the defendant and third-party plaintiff, Pitt County Transportation Company, by counsel, and pursuant to the provisions of Rule 12(c), Federal Rules of Civil Procedure, moves the Court for judgment on the pleadings against the plaintiff, for the reason that the Motion for Judgment filed herein establishes on its face that the contract upon which plaintiff's claim for indemnification is based is contrary to the rules and regulations of the Interstate Commerce Commission and is, as a matter of law, null and void, as contrary to law and public policy.

[Subscription and certificate of service omitted in printing]

APPENDIX F

Virginia:

IN THE CIRCUIT COURT OF THE COUNTY OF CAROLINE

CAROLINA FREIGHT CARRIERS CORPORATION
for the use and benefit of Liberty Mutual Insurance Company, Plaintiff

V.

PITT COUNTY TRANSPORTATION CO., Defendant.

MOTION FOR JUDGMENT

Filed February 5, 1972

The plaintiff moves the court for judgment against the defendant in the amount of Fifty Thousand ($50,000.00) Dollars with interest from May 24, 1971, upon the following grounds:

1. That on June 19, 1969, Carolina Freight Carriers Corporation entered into a lease agreement with the defendant. A copy of the lease agreement is attached hereto and hereby made a part hereof.

2. Under the terms and conditions of the lease referred to above, the defendant agreed to indemnify and assume and be fully responsible to the lessee, Carolina Freight Carriers Corporation, and its liability insurance company for any loss or damage resulting from the negligence of the defendant's drivers, agents, servants or employees.

3. Ira Jay Pugh, an employee of the defendant, was the driver of the 1963 International tractor-trailer unit referred to in said lease.

4. On or about June 20, 1969, at 11:00 a.m. Ira Jay Pugh was improperly parked in a location not designated for parking in the southbound rest area on Interstate 95 approximately 2.3 miles south of the limits of Ladysmith, Virginia, in Caroline County, when Robert Powers and his two-year old daughter, Jennifer Lee Powers, walked behind the defendant's tractor-trailer unit being operated by their employee, Ira Jay Pugh.

5. At the same time and place, Ira Jay Pugh, an agent, servant and employee of the defendant, negligently and carelessly caused the 1963 International tractor-trailer unit owned by the defendant to move backwards, which movement crushed and instantly killed Jennifer Lee Powers and seriously injured her father, Robert Powers.

6. Claims were made by the estate of Jennifer Lee Powers and by Robert Powers against Carolina Freight Carriers Corporation and its liability insurance carrier, Liberty Mutual Insurance Company. Suits were filed in both claims.

7. On or about May 19, 1971, the death by wrongful act claim on behalf of the estate of Jennifer Lee Powers was settled by Liberty Mutual Insurance Company in the amount of $10,000.00.

8. On or about May 24, 1971, the personal injury claim of Robert Powers was settled in the amount of $40,000.00.

In accordance with the terms of the lease agreement attached hereto, the plaintiff moves the court for judgment against the defendant in the sum of $50,000 with interest from May 24, 1971.

CAROLINA FREIGHT CARRIERS CORPORATION

By: /s/ Nathan H. Smith
Counsel

CAROLINA FREIGHT CARRIERS CORPORATION
SPECIAL COMMODITIES DIVISION
P. O. Box 797
CHERRYVILLE, NORTH CAROLINA 28021

Manifest No. _____
Pro. No. S-3[illegible]

Lease Agreement

Serial No. 006-006

This an Equipment Lease Agreement, hereby acknowledges receipt of and leases from Pitt County Trucking Co. [illegible]
of Greenville North Carolina [illegible] for the exclusive possession, control and use
and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Equipment Lease Agreement, the following motor equipment to be used by
said lessee beginning at [illegible] which is the interstate service to the point nearest

Owner's Name

(1) Name	Address	City	State	Phone
Pro 2 Pitt	PO Box 617	Greenville	N.C.	
(2) Name	Address	City	State	Phone

(1) Chauffeur's License No.	State	Expires	Social Security No.	(2) Chauffeur's License No.	State	Expires	Social Security No.
24-1[illegible]0	N.C.	7/[illegible]					

DESCRIPTION OF VEHICLE(S)

DESIGNATION. Said VENDEE, LESSOR is the owner of motor vehicle equipment suitable for the transportation of property which equipment is more particularly described as follows:

	Make	Type	Model	Serial No.	License No.	State	Year
TRACTOR	Inter.	63	Tr.	5B24050	3111 9A	N.C.	[illegible]
TRAILER	V. Van	64		[illegible]7	[illegible]	N.C.	[illegible]

For and in consideration of the use of vehicles as above [illegible] at $[illegible] per [illegible] and vehicles, LESSOR desires to lease
the above described motor vehicle equipment to LESSEE and LESSEE desires to lease said motor vehicle equipment from LESSOR, all upon the terms and conditions hereinafter set forth, and the parties hereto, in order to carry out this agreement, do hereby covenant and agree as follows:

Now, therefore, in consideration of the mutual covenants and agreements hereinafter set forth to be kept and performed by the parties hereto, and in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration in hand paid by each of the parties hereto to the other, the receipt and sufficiency of which is hereby acknowledged, LESSOR does hereby lease to LESSEE and LESSEE does hereby hire from LESSOR the above described motor vehicle equipment, together with such trailers as may be substituted therefor by LESSOR as hereinafter provided, upon the following terms and conditions:

1. TERM. The term of this lease shall begin on the [illegible] day of [illegible], 19[illegible], at [illegible] o'clock [illegible] M., at [illegible], and shall continue for a period of [illegible] year[illegible] thereafter, unless sooner terminated as hereinafter provided.

2. RENTAL. LESSEE agrees to pay to LESSOR as rental for the use of said motor vehicle equipment the sum of $[illegible] per [illegible] payable [illegible] in advance, beginning on the [illegible] day of [illegible], 19[illegible], and a like sum on the [illegible] day of each [illegible] thereafter during the term of this lease.

3. USE AND MAINTENANCE. LESSEE shall not permit any driver to operate said motor vehicle equipment unless such driver has been approved by LESSOR. LESSEE shall not use or permit said motor vehicle equipment to be used in violation of any law or ordinance or in violation of any policy of insurance carried on said motor vehicle equipment. LESSEE shall not overload said motor vehicle equipment. LESSEE shall, at its own cost and expense, maintain said motor vehicle equipment in good operating condition, ordinary wear and tear excepted, and make all necessary adjustments and repairs thereto during the term of this lease. LESSEE shall not make any alterations, additions or improvements to said motor vehicle equipment without the written consent of LESSOR first had and obtained. All additions, improvements and repairs to said motor vehicle equipment, whether or not consented to by LESSOR, shall become the property of LESSOR at the termination of this lease, unless otherwise agreed by LESSOR in writing. LESSEE shall not remove said motor vehicle equipment from the United States without the written consent of LESSOR first had and obtained.

4. LICENSES AND TAXES. LESSEE shall, at its own cost and expense, obtain all licenses and permits required for the operation of said motor vehicle equipment during the term of this lease, including, but not limited to, any required licenses or permits from the Interstate Commerce Commission, and shall pay all taxes, assessments and other charges levied or assessed upon said motor vehicle equipment during the term of this lease. LESSEE shall, at its own cost and expense, comply with all laws, rules, orders and regulations of any federal, state, municipal or other governmental agency with respect to the use, maintenance and operation of said motor vehicle equipment during the term of this lease.

5. INSURANCE. LESSEE agrees to maintain bodily injury, theft, collision and property damage insurance covering the motor vehicle equipment described herein, and to be solely and fully responsible therefor. All insurance coverage shall contain only deductible responsibilities customary for any federal or state regulated agency. LESSEE is responsible for securing and maintaining the insurance. Failure to secure insurance will be the responsibility of the LESSEE. Upon request of LESSOR, LESSEE shall furnish to LESSOR a certificate of insurance evidencing the insurance coverage required by this paragraph. LESSEE agrees to furnish LESSOR at the LESSEE'S request a copy of a certificate of insurance covering the motor vehicle equipment described herein.

6. LESSEE agrees that during the term of this lease:
(a) He will be solely responsible for the payment of the said Social Security Taxes, Old Age Benefits, Unemployment Compensation Taxes, Workmen's Compensation Insurance, Personal Property Taxes, License Fees, and payment of all payroll deductions and taxes for employees furnished by the LESSOR.
(b) He pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease and to be borne by and be the sole responsibility of the LESSEE.
(c) To indemnify LESSOR against loss or liability of any resulting from the injury or death of the driver or drivers of the vehicle above described or any helpers employed by LESSEE in connection with the hiring or unloading of said vehicles.
(d) To indemnify LESSOR against any loss or damage resulting from the negligence, incompetence or dishonesty of said driver or helpers.
(e) To indemnify LESSOR against any loss or damage to or destruction of the trailer or other such equipment of the LESSEE issued by the LESSOR or his employee.
(f) To indemnify the LESSOR against any loss resulting from claims brought against the LESSEE for any property damage and bodily injury sustained by the public while the motor is operated from a horse.

7. LESSEE agrees to pay, if he has not already done so, any and all taxes, including but not limited to personal property, privilege tax, rental tax, assessed use fees or taxes, gross and business fees, drivers license fees, and any other taxes, fees, licenses, charges or fines that may be assessed on the equipment, equipment, or the operation thereof.

8. The LESSEE shall perform its contract in a safe competent and workmanlike manner and shall be responsible to the LESSOR for complying and insuring that his employees, agents and servants shall comply with all applicable requirements of federal, state and local governmental authority, but not limited to the rules and regulations of the Interstate Commerce Commission.

9. The LESSEE shall employ only competent, careful drivers, drivers helpers, and helpers who shall be experienced, competent, and qualified to carry out work to be performed by the LESSEE under this contract. Such employees shall be familiar with and meet all the requirements of applicable federal and state laws and municipal ordinances and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

10. In consideration of said agreement that the LESSEE is to remain in full force and effect for the period of time specified in Paragraph 1, unless one or more of the covenants set forth herein are breached by the party suffering or precipitating as a result of such breach or violation of this lease may cancel this agreement forthwith. If both parties to this lease mutually agree they may cancel this lease forthwith at the point LESSEE is ordered to an accident vicinity as close to the LESSEE as LESSEE'S prime or any nearer point LESSEE'S base of business.

11. LESSOR warrants that the vehicles herein listed are now subject to no existing lease and that he has the full and complete legal right to lease the said vehicle to the LESSEE he can.

12. LESSOR agrees that LESSEE may cancel this lease forthwith in the event LESSOR fails to fully comply with all ICC and State Regulatory Agency Safety Regulations.

13. Anything herein to the contrary notwithstanding neither party shall in any event be deemed to be a partner, joint venturer, associate or employee of the other in the conduct of its business or shall either party be liable for any debts incurred by the other in the conduct of its business. The relationship of the parties during this agreement shall at all times be that of independent contractors.

14. LESSOR agrees that immediately upon termination of the lease it will remove all identification required by state and federal regulatory agencies which was supplied to LESSOR by LESSEE and will return said identification forthwith to the LESSEE.

15. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing and signed by both parties. This agreement shall be governed by the laws of the State of North Carolina. This Motor Vehicle Equipment Lease Agreement supersedes and cancels all prior agreements and terms entered into by the parties hereto.

DRIVER'S INSTRUCTIONS: Stop into Carolina Frt. Terminal & [illegible] Cherryville N.C. for Florida Cab Card.

DRIVERS CERTIFICATE BOX ON DUTY TIME FOR PERIOD SEVEN DAYS. (Must include all time shown on lines 3 and 4 of your log.)

REVISED SECTION 395.8 MOTOR CARRIER SAFETY REGULATIONS & 395.8

DRIVER	Total Hours	From Date	Thru Date
1st	[illegible]	[illegible]	[illegible]
2nd			

I certify, by my signature below, that the total hours on duty for seven consecutive days, as so stated, are true and correct and further that I was relieved from duty prior to the trip on the following:

1st Driver
Date [illegible] Hour of Day [illegible] A.M. [illegible] P.M.
2nd Driver
Date _____ Hour of Day _____ A.M. _____ P.M.
Signature of 1st Driver
Signature of 2nd Driver

Driver Permit Numbers	Driver Permit Numbers

RECEIPT FOR ACCEPTANCE OF EQUIPMENT

Received from [illegible]
(Lessor's Name)
The equipment described above on [illegible] 19[illegible]
at [illegible] Florida on [illegible]
Carolina Freight Carriers Corporation
By [illegible]

RECEIPT FOR RETURN OF EQUIPMENT

Received from _____
CAROLINA FREIGHT CARRIERS CORP.
The equipment described above on date 6-2-69
at Miami Florida on 11:30 a.m.
By Robert R. [illegible]
Lessor's Name

I certify that the vehicle described on this Motor Vehicle Trip Lease Agreement had not prior to the effective date of this lease completed a tour of service immediately as described in Section 203 (b) (6) of the Motor Carrier Act.

The load of exempt commodities consisting of _____ (Commodity)
originated at _____ (City and State) _____ (Date) and unloaded at destination _____ (City and State) _____ (Date)

I, _____ (Signature of owner or agent duly authorized to [illegible])

INSPECTION RECORD (Section 396.1(MC-41)

TRACTOR	Not Defective	Defective	Date Corrected
Air Compressor			
Brakes, Service			
Brakes, Parking			
Connections for Trailer			
Coupling Devices			
Exhaust System			
Fifth Wheel			
Frame			
Glass			
Horn			
Lights, All			
Mirrors			
Springs			
Steering Mechanism			
Tires			
Wheels			
Windshield Wipers			
Other			
No Defects			

TRACTOR	Not Defective	Defective	Date Corrected
Lights, All Clearance			
Licenses			
Mirrors			
Safety Equipment			
Spare Components			
Springs			
Steering			
Tires & Wheels			
Wipers			
Warning Systems, All			
Other			
No Defects			

TRAILER	Not Defective	Defective	Date Corrected
Breakaway Emergency			
Brake Service			
Brake Connections			
Doors, All			
Hand Coupler			
Landing Gear			
Lights & Reflectors			
Mud Flaps			
Pickup Shoes			
Tires & Wheels			
Springs			
Undercarriage			
Other			
No Defects			

Remarks: [illegible]

I hereby certify that on [illegible] 19[illegible] I carefully inspected the above and this is a true and correct report of same. _____ Signature of Inspector
I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such an inspection as a representative of this company. [illegible] Carrier

Distribution:
Original to Carolina Freight Carriers Corporation, Cherryville, N. C.
One copy to Owner Lessor
One copy to Driver
One copy to Agents File

TERMS AND CONDITIONS OF THIS LEASE

1. That LESSEE may not have the right to sublease, sublease this equipment to a separate carrier.

2. LESSEE will assume and pay all costs of gas, liability and property damage insurance on the vehicle while customary or the direction of the lessee and provide insurance coverage to protect the interests of the lessor, lessee, and the general public to the extent and limits as required by the laws of the State of North Carolina. LESSEE agrees to pay for all damage to any third person, property or persons, or to the equipment, or to any of its agents, servants, or employees, that the operation of said equipment may cause to be done and for all fines imposed for any such damage and all the costs and expenses incurred by the lessee in connection therewith. LESSEE agrees to indemnify the lessee against any and all claims, loss, damage, expense, or liability resulting from the operation of said equipment by the lessee, and in that event, the lessee consents that be subrogated to the rights of the lessee against the lessee herein.

3. LESSEE agrees that the LESSEE shall withhold payment of any and all sums then or thereafter due the LESSOR to the extent of such expense and claims until the determination of such accident and said claims which in part shall be deducted by the arbitration thereof.

4. LESSEE has the right to operate and interline the said equipment with other common carriers for purposes of transportation on their authorized routes pursuant to the rules and regulations of the Interstate Commerce Commission.

5. LESSOR agrees that during the term of this lease the motor vehicle equipment described above shall be under exclusive control of the LESSEE as required by the rules and regulations of the Interstate Commerce Commission and for the limited purpose of safety to the public and safe delivery of shipment.

6. LESSOR agrees that he will comply with the terms and conditions of the bills of lading covering the transportation and transportation of the shipment. LESSOR is responsible for his employees compliance with this article.

7. LESSOR agrees as the fully responsible for the above described equipment maintaining said equipment in accordance with the "safety" regulations and specifications set forth by the Interstate Commerce Commission and to keep said equipment in good operating condition and appearance, to maintain such records as shall be required by the Interstate Commerce Commission and/or state or local authorities, other regulatory agencies, to allow agents to periodically inspect said equipment, and to perform all other acts required for the maintenance of said vehicle during the term of this lease. LESSOR may require the LESSEE to store his equipment when not in use on the LESSEE'S premises.

8. LESSOR agrees to maintain bodily theft, collision and liability insurance covering the above described equipment, and to be solely and fully responsible therefor. All insurance coverage shall contain only deductible responsibilities customary for any federal or state regulated agency. LESSOR is responsible for securing and maintaining the insurance. Failure to secure insurance will be the responsibility of the LESSEE. Upon request of LESSOR, LESSEE shall furnish to LESSOR at the LESSEE'S request a copy of a certificate of insurance evidencing the insurance coverage required by this paragraph. LESSEE agrees to furnish LESSOR at the LESSEE'S request a copy of a certificate of insurance covering the motor vehicle equipment described herein.

9. LESSOR agrees that during the term of this lease:
(a) He will be solely responsible for the payment of the said Social Security Taxes, Old Age Benefits, Unemployment Compensation Taxes, Workmen's Compensation Insurance, Personal Property Taxes, License Fees, and payment of all payroll deductions and taxes for employees furnished by the LESSOR.
(b) He pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease are to be borne by and be the sole responsibility of the LESSEE.
(c) To indemnify LESSEE against loss or liability of any resulting from the injury or death of the driver or drivers of the vehicle above described or any helpers employed by LESSOR in connection with the hiring or unloading of said vehicles.
(d) To indemnify LESSEE against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers.
(e) To indemnify LESSEE against any loss or damage to or destruction of the trailer or other such equipment of the LESSEE issued by the LESSOR or his employee.
(f) To indemnify the LESSEE against any loss resulting from claims brought against the LESSEE for any property damage and bodily injury sustained by the public while the motor is operated from a horse.

10. LESSOR agrees to pay, if he has not already done so, any and all taxes, including but not limited to personal property, privilege tax, rental tax, assessed use fees or taxes, gross and business fees, drivers license fees, and any other taxes, fees, licenses, charges or fines that may be assessed on the equipment, equipment, or the operation thereof.

11. The LESSOR shall perform its contract in a safe competent and workmanlike manner and shall be responsible to the LESSEE for complying and insuring that his employees, agents and servants shall comply with all applicable requirements of federal, state and local governmental authority, but not limited to the rules and regulations of the Interstate Commerce Commission.

12. The LESSOR shall employ only competent, careful drivers, drivers helpers, and helpers who shall be experienced, competent, and qualified to carry out work to be performed by the LESSEE under this contract. Such employees shall be familiar with and meet all the requirements of applicable federal and state laws and municipal ordinances and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

13. In consideration of said agreement that the LESSEE is to remain in full force and effect for the period of time specified in Paragraph 1, unless one or more of the covenants set forth herein are breached by the party suffering or precipitating as a result of such breach or violation of this lease may cancel this agreement forthwith. If both parties to this lease mutually agree they may cancel this lease forthwith at the point LESSEE is ordered to an accident vicinity as close to the LESSEE as LESSEE'S prime or any nearer point LESSEE'S base of business.

14. LESSOR warrants that the vehicles herein listed are now subject to no existing lease and that he has the full and complete legal right to lease the said vehicle to the LESSEE he can.

15. LESSOR agrees that LESSEE may cancel this lease forthwith in the event LESSOR fails to fully comply with all ICC and State Regulatory Agency Safety Regulations.

16. Anything herein to the contrary notwithstanding neither party shall in any event be deemed to be a partner, joint venturer, associate or employee of the other in the conduct of its business or shall either party be liable for any debts incurred by the other in the conduct of its business. The relationship of the parties during this agreement shall at all times be that of independent contractors.

17. LESSOR agrees that immediately upon termination of the lease it will remove all identification required by state and federal regulatory agencies which was supplied to LESSOR by LESSEE and will return said identification forthwith to the LESSEE.

18. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing and signed by both parties. This agreement shall be governed by the laws of the State of North Carolina. This Motor Vehicle Equipment Lease Agreement supersedes and cancels all prior agreements and terms entered into by the parties hereto.

IMPORTANT INSTRUCTIONS

19. THIS LEASE WILL NOT BE PAID UNTIL DRIVER HAS TURNED IN

1. Delivery Receipts (All Weights with no Exceptions)
2. Bill of Lading (If Shipment was Billed)
3. Original Copy of Lease (If 1 Trip or Less)
4. Identification Signs (2 Signal Number)
5. Current Physical to Phase III not on File)
6. Vehicle Condition Report Signed
7. Attached Trip Log Book Sheets
   (a) Hours shown & Totaled

Original to Carolina Freight Carriers Corporation, Cherryville, N. C.
One copy to Owner Lessor
One copy to Driver
One copy to Agents File

BEST COPY AVAILABLE

APPENDIX G

49 UNITED STATES CODE

§ 304. Powers and duties of Commission–Powers and duties generally

(a) It shall be the duty of the Commission–

* * * * * *

(3) To establish for private carriers of property by motor vehicle if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321 322(a), (b), (d), (f), and (g), and 324 of this title.

* * * * *

Regulations governing use of vehicles owned by others

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property–

(1) regulations requiring that any such lease, contract, or other arrangment shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier,and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Vol. 10 United States Code, pp.11940 and 11942 (1970 ed.).

49 CODE OF FEDERAL REGULATIONS

§ 1057.4 Augmenting equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of the equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangments.

(3) *Minimum duration of 30 days when operated by lessor.* Shall specify the period for which it applies, which shall not be less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) *Equipment used in agricultural or perishable operations.* That subject to the proviso in (c) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(*a*) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203(b)(4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by motor vehicle as defined in section 203(a)(17) of the Act and is used regularly in the transportation of property of a character embraced within section 203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(*b*) Where the motor vehicle so to be used is one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(*c*) *Provided,* In either instance that prior to the execution of the lease,the authorized carrier receives and retains a statement signed by the owner of the equipment, or

someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this subsection, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

(ii) *Automobile and tank truck carriers.* That such 30-day minimum period shall not apply to equipment owned or held under lawful lease by an authorized automobile carrier or tank truck carrier and used in the transportation of motor vehicles or commodities in bulk, resepctively, when leased or subleased to other such authorized carriers.

(iii) *Ice and snow control purposes.* That such 30-day minimum period shall not apply to dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1, to April 30, both inclusive, of each year.

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carrier; intermittent operations under long-term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions

need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) *Compensation to be specified.* Shall specify the compensation to be paid by the lessee for the rental of the leased equipment.

(6) *Duration to be specific.* Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) *Safety inspection of equipment by the authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation. The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and if his inspection discloses that the equipment does not comply with the requirements of the said safety regulations, possession thereof shall not be taken. When such an inspection has been made, the authorized carrier or an officer or partner thereof, or a safety director or other supervisory employee responsible for safety compliance, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized to do so by such carrier as its representative. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

REPORT OF VEHICLE INSPECTION

Description of vehicle:
Make_____ Year_____
Model_____ Serial No_____
Type: Tractor_____ Trailer_____
Semitrailer_____
License plate: No. _____ State_____
Owner's name_____
Name of authorized carrier_____

Indicate in the proper column the result of the inspection of each item listed:

Item	Not defective	Defective	Description of defect
Body			
Brakes			
Cooling System			
Drive line			
Emergency equipment			
Engine			
Exhaust			
Fuel system			
Glass			
Horn			
Leaks			
Lights (state which)			
Reflectors			
Speedometer			
Springs			
Steering			
Tires			
Wheels			
Windshield wiper			

Any other items requiring attention _____

_____

I hereby certify that on the _____day of_____ I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

_____
(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a respresentative of_____
(Name of authorized carrier)

_____
(Signature of carrier, partner, officer, safety director, or other supervisory employee responsible for safety compliance.)

Date_____

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment during the period of the lease, contract, or other arrangment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possesson of the equipment.

(2) *Certified statement may be carried on vehicle in lieu of lease.* Unless a copy of the lease, contract or other arrangement is carried on the equipment, as provided in paragraph (a)(7) of this section, the authorized carrier or its regular employee or agent shall prepare a statement certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease, contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract, or other arrangement.

(e) *Driver of equipment to be in compliance with safety regulations.* Before any person other than a regular employ-

ee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

(f) *Record of equipment to be maintained; shipping documents to identify the authorized carrier.* The authorized carrier utilizing equipment operated under this part for periods of less than 30 days shall prepare and keep a manifest or other documents covering each trip for which the equipment is used in its service, containing the name and address of the owner of such equipment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to this part is operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests, or other papers identifying the lading, and containing the foregoing information, which shall clearly indicate that the transportation of the property carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This section shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier. [32 F.R. 20056, Dec. 20, 1967, as amended at 33 F.R. 2848, Feb. 10, 1968]

* * * * *

Supreme Court, U. S.
FILED
SEP 20 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION,
FOR THE USE AND BENEFIT OF
LIBERTY MUTUAL INSURANCE COMPANY
AND
OLD REPUBLIC INSURANCE COMPANY,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

EDWARD A. MARKS, JR.
NATHAN H. SMITH
SANDS, ANDERSON, MARKS & CLARKE
P. O. Box 1998
Richmond, Virginia 23216

Counsel for Respondent, Carolina Freight Carriers Corporation, for the use and benefit of Liberty Mutual Insurance Company

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FOR THE USE AND BENEFIT OF
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OLD REPUBLIC INSURANCE COMPANY,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

In accordance with Rule 40 of the Revised Rules of the Supreme Court of the United States the respondent, hereinafter referred to as Carolina, accepts the petitioner's, hereinafter referred to as Pitt, statements as to opinions below, jurisdiction, statutes and regulations involved and the statement of facts. Carolina will, however, attempt to refine what it considers to be the basic question involved in this case.

QUESTION PRESENTED

Carolina believes that the issue of this case can be more simply stated and would refine that issue to the following statement:

1. Does Pitt owe a duty to indemnify Carolina under the provisions of the lease as set out in full in Replacement Appendix F?

This is the basic issue as stated by both of the courts below. See Appendices A and B, pages 2A and 12A.

ARGUMENT

The Fourth Circuit's opinion in this case is so clear and to the point that we wish to adopt it as the primary part of our argument. It will be found in Appendix A, pages 1A to 9A.

It is apparent from a reading of Pitt's Petition for a Writ of Certiorari that it has missed the point of the Fourth Circuit's opinion (*Carolina Freight Carriers Corporation* v. *Pitt County Transportation Company,* 492 F.2d 243 (4th Cir. 1974)) and has misinterpreted both the lease agreement, set out in full in Replacement Appendix F and United States Code Requirements and ICC Regulation Requirements set out in Appendix G.

There is no indication in this case in fact or otherwise that Carolina or Liberty Mutual Insurance Company, Carolina's insurer, violated the terms of either the lease, the Federal statutes or the regulations. To the contrary, all of the evidence is that Carolina conformed to every requirement. The lease itself provides in its very first paragraph on the first page as follows:

> "Carolina Freight Carriers Corporation, lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Company, lessor, of Farmville, North Carolina 919-SK3-3109 *for its exclusive possession, control, and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Lease Agreement,* the following vehicular equipment to be used by said lessee beginning at 1 PM o'clock on 6/19/69 in its interstate service to transport merchandise." (Emphasis provided.) Replacement Appendix F, page 1.

The body of the agreement reiterates the above statement in paragraph 5 of the terms and conditions of the lease. Replacement Appendix F, page 3.

In fact, in this particular case two suits were brought in the United States District Court for the Eastern District of Virginia, Richmond Division, against Carolina and the driver of the vehicle, Pugh. Those suits were defended by Liberty Mutual Insurance Company as the insurer of Carolina and were ultimately compromised, settled and paid by Liberty Mutual.

Nowhere does the record indicate that either Carolina or Liberty Mutual violated any of the requirements of the Federal statutes or regulations.

Whose Agent Was Pugh, The Driver Of The Vehicle?

Pitt in its brief has devoted a large part of its argument to this question. Pitt contends that Pugh is Carolina's statutory agent.

It is perfectly obvious that Pugh would have had to have been on the business of Carolina at the time the accident occurred. Otherwise, Liberty Mutual and Carolina would not have been obligated to defend him and to settle the cases brought against him on his behalf. However, there is also not any question that Pugh was the employee of Pitt. The lease agreement says he was. See paragraphs 9, 10 and 12 of the lease agreement. Replacement Appendix F, pages 5A and 6A.

It seems apparent, then, that Pugh was the agent of both Carolina and Pitt but for different purposes. As to the public Pugh was on the business of Carolina at the time of the accident and, therefore, Carolina and its liability carrier were liable to third parties for Pitt's negligence. This result is obviously what was intended by both the Federal statutes and the regulations set out in Appendix G. But as between Carolina and Pitt, Pugh remains Pitt's employee. In point of fact he has never been anything else. The regulations themselves contemplate this situation by making certain requirements in the situation where "any person other than a regular employee of the authorized carrier is assigned to drive equipment." § 1057.4(e), Appendix G, pages 33A and 34A.

It is important to note that neither the Federal statutes nor the regulations say what Pitt apparently wishes they would say—that is, that indemnity agreements between carriers are not permitted. If that had been intended it could have been very succinctly stated in the regulations.

It should be further noted that even if the regulations did provide specifically that indemnity contracts as between lessor and lessee would be of no effect and were void, the effect might have been to nullify the most important reason for the regulations. Such a regulation could have effectively removed a financially responsible defendant from liability to an innocent third party.

This conflict is pointed out by one of the cases cited by Pitt in its brief. *Simmons* v. *King,* 478 F.2d 857 (5th Cir. 1973). In that case a party named Dubose was the lessee and occupied the same position that Carolina does in this case. A party named Ace was the lessor and occupied the same position as Pitt does in this case. A person named King was the driver and was the employee of Ace. At page 867 of the opinion the 5th Circuit made the following statement:

> "Although Dubose is liable for King's acts as a matter of law, Ace could still be likewise liable under applicable common (civil) Louisiana standards of control. This is not as incongruous as might be supposed. ICC can mandate a positive legal responsibility which we uphold and the only way it would be meaningful—to give protection to the injured member of the public. At the same time Ace has, or may have, a practical control over King of a kind which would not allow it to obtain an automatic insulation from liability from the mere terms of a lease between two parties."

Are The Indemnity Provisions Of The Lease Otherwise Valid?

As has been pointed out before both the 5th Circuit in *Allstate Insurance Company* v. *Alterman Transport Lines, Inc.,* 465 F.2d 710 (5th Cir. 1972) and the 4th Circuit in *Carolina Freight Carriers Corporation* v. *Pitt County Transportation Company, supra,* have stated that they find no conflict at all between the language of the Federal regulations and the indemnity agreement. Two freely contracting parties, according to these rulings, have a perfect right to determine as between themselves where a loss should fall under certain circumstances.

Pitt does not contend that the lease agreement does not provide for indemnity under these circumstances. Pitt also agrees that under the specific provisions of the lease agreement, North Carolina Law is to apply. See paragraph 18 of the lease agreement, Replacement Appendix F, page 7. Pitt has already cited in its Petition for a Writ of Certiorari the controlling North Carolina cases and we do not feel it necessary to burden this brief with a restatement of those cases. Suffice it to say that North Carolina Law supports the validity of the indemnification agreement.

CONCLUSION

Carolina respectfully submits that this Court should not grant a Writ of Certiorari in this case. The underlying Fourth Circuit opinion as set out in Appendix A very clearly distinguishes the *Alford*[1] case and requires no further clarification by this Court.

As far as we can see, there is no uncertainty in this area as between the rulings of the circuits. It is true that the *Alford* case, *supra,* may have assumed a violation of the regulations which in fact did not exist, but the Carolina Freight case decided by the Fourth Circuit as the underlying decision in this matter certainly very clearly delineates the differences between violation of the Federal regulations and the enforcement of the indemnity agreement.

Carolina respectfully urges the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

EDWARD A. MARKS, JR.
NATHAN H. SMITH
Of Counsel

SANDS, ANDERSON, MARKS & CLARKE
P. O. Box 1998
Richmond, Virginia 23216

Counsel for Respondent Carolina Freight Carriers Corporation, for the use and benefit of Liberty Mutual Insurance Company

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[1] *Alford* v. *Major,* 470 F.2d 132 (7th Cir. 1972) *affirming,* 314 F.Supp. 979 (N.D. Ind. 1970).

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing brief were mailed, postage prepaid, to Alexander H. Slaughter, Esquire, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219, counsel for petitioner and three copies were mailed, postage prepaid, to J. W. Morris, III, Esquire, Browder, Russell, Little & Morris, 1510 Ross Building, Richmond, Virginia 23219, counsel for respondent, on or before September 20, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States and that all parties required by law to be served have been served.

Edward A. Marks, Jr.
Of Counsel for Respondent

Supreme Court, U. S.
FILED
JUN 3 1974

In The

Supreme Court of the United States

October Term, 1973

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION,

FOR THE USE AND BENEFIT OF

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

AND

OLD REPUBLIC INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLACEMENT APPENDIX F

JAMES L. SANDERLIN
ALEXANDER H. SLAUGHTER

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

Attorneys for Petitioner,
Pitt County Transportation Company

In The

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AND

OLD REPUBLIC INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLACEMENT APPENDIX F

This replacement Appendix is only intended to provide a more legible copy of the Motor Vehicle Trip Lease Agreement at issue in this case and to replace pages 24(a) and 25(a) of Appendix F to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in the above case.

Form 323
4/69

CAROLINA FREIGHT CARRIERS CORPORATION
SPECIAL COMMODITIES DIVISION

P. O. Box 697

CHERRYVILLE, NORTH CAROLINA 28021

Manifest No. _____

Pro. No. S-378704

Advance: Ck. No. NONE

Amount NONE

Lease Agreement

Placards Issued Issued Serial No. 006-006

Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Co. Lessor, of Farmville (St. Address) North Carolina (City, State) 919-SK3-3109 (Telephone No.) for its exclusive possession, control, and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Lease Agreement, the following vehicular equipment to be used by said lessee beginning at 1PM o'clock on 6/19/69 (Date) in its interstate service to transport merchandise.

DRIVERS NAME(S)

(1) Name	Address	City	State	Phone
Ira J Pugh	PO Box 417	Winterville	N.C.	None
(2) Name	Address	City	State	Phone

(1) Chauffeur's License No.	State	Expires	Social Security No.	(2) Chauffeur's License No.	State	Expires	Social Security No.
2891100	N.C.	7/28/69					

DESCRIPTION OF VEHICLE(S)

WITNESSETH, THAT WHEREAS, LESSOR is the owner of motor vehicle equipment suitable for the transportation of property which equipment is more particularly described as follows:

	Make	Year	Model	Serial No.	License No.	State	Year
TRACTOR	Inter.	63	Tr.	5824050	3111 PA	N.C.	2/15/70
TRAILER	E. Van	64		12267	999-Z	N.C.	2/15/70

For and in consideration of the sum of (inclusive of driver's wages) $ 75% or _____ % of $ 5625.00 and whereas, LESSOR desires to lease the above described motor vehicle equipment to LESSEE, and LESSEE desires to consummate such lease. Now, therefore, it is hereby agreed between the parties hereto that for the consideration expressed in the manifest issued by the LESSEE or SUBLESSEE, in connection with each trip of the vehicle, or otherwise agreed between LESSOR and LESSEE, the LESSOR leases said equipment to the LESSEE upon the following terms and conditions set forth below and on the reverse side hereof which are made a part hereof the same as if written below.

FROM: City	State	Date	Time A.M. P.M.	TO: City	State	Date	Time
New York, N. Y.				Pampano Beach,	Florida		

CONSIGNOR	ORIGIN	CONSIGNEE	DESTINATION	Approximate Weight
Manitowoc Crane	New York, N.Y. Pier #32 North	Bay Steel Prod.	Pampano Beach Florida	24,000

INSPECTION RECORD (Section 2074(c)MC-43

TRACTOR	Not Defective	Defective	Date Corrected	TRACTOR	Not Defective	Defective	Date Corrected	TRAILER	Not Defective	Defective	Date Corrected
Air Compressor				Lights-Reflectors				Breakaway, Emergency			
Brakes, Service				Licenses				Brakes Service			
Brakes, Parking				Mirrors				Brake Connections			
Breakaway Valve				Safety Equipment				Hoses, Air			
Clutch-Transmission				Speedometer				Identification			
Exhaust System				Springs				Landing Gear			
Fuel System				Steering				Lights & Reflectors			
Fifth Wheel				Tires & Wheels				Mud Flaps			
Heat-Defroster				Wipers				Pickup Plate			
Hoses-Air				Warning Systems, Air				Tires & Wheels			
Identification				Other				Springs			
Indicator, Air				No Defects				Undercarriage			
								Other			
								No Defects			

Remarks: None

I hereby certify that on 6/19/69 (Date Inspected) I carefully inspected the above and this is a true and correct report of same. _____ (Signature of Inspector)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such an inspection as a representative of this company. 6/19/69 (Date) _____ (Signature) Shop Manager (Title)

DRIVER'S INSTRUCTIONS: Stop into Carolina Frt. Terminal & Cherryville N.C. for Florida Cab Card.

RECEIPT FOR POSSESSION OF EQUIPMENT

Received from Pitt County truck (Lessor's Name)

The equipment described above on (date) 6/19/69

at Hallsville time 1:PM a.m. p.m.

N. Carolina Freight Carriers Corporation

Per _____

RECEIPT FOR RETURN OF EQUIPMENT

Received from CAROLINA FREIGHT CARRIERS CORP.

The equipment described above on (date) 6-26-69

at Rupert B K time 11:30 a.m. p.m.

Signed _____ (Lessor's Name)

I certify that the vehicle described in this Motor Vehicle Trip Lease Agreement had, just prior to the effective date of this lease, completed a haul of exempt commodities as described in Section 203 (b) (6) of the Motor Carrier Act.

This load of exempt commodities consisting of _____ (commodity)

originated at: _____ (City and State) on _____ (Date) and unloaded at destination

_____ (City and State) on _____ (Date)

I, _____ (Owner or Agent duly authorized to act in Lessor's behalf) do hereby further certify that I have authority to lease the vehicle described above in the Motor Vehicle Trip Lease Agreement.

Per: _____ (Signature of owner or agent duly authorized in Lessor's behalf)

DRIVERS CERTIFICATE FOR ON DUTY TIME FOR PRIOR SEVEN DAYS (Must include all time shown on lines 3 and 4 of your logs)

REVISED SECTION 195.8 MOTOR CARRIER SAFETY REGULATIONS 6-30-64

DRIVER	Total Hours	From Date	Thru Date	
1st	37	6/12	6/19	
2nd				

I certify, by my signature below, that the total hours on duty for seven previous days, as so stated, are true and correct and further that I was relieved from duty prior to this trip on the following:

1st Driver

Date 6/18 Hour of Day 6 A.M. P.M.

2nd Driver

Date _____ Hour of Day _____ A.M. P.M.

Signature of 1st Driver _____

Signature of 2nd Driver _____

Tractor Permit Numbers	Trailer Permit Numbers

BEST COPY AVAILABLE

TERMS AND CONDITIONS OF THIS LEASE

1. That LESSEE may and has the right to forthwith sublease this equipment to a common carrier.

2. LESSEE will assume and pay all costs of public liability and property damage insurance on the vehicle while operating at the direction of the Lessee and provide insurance covering cargo being transported at the direction of the Lessee. However, in the event any loss or damage to cargo or property damage or personal injury to any third person takes place by reason of negligence or dishonesty of the owner, its agents, servants, or employees, then the owner does hereby agree to assume and be fully responsible for any such damage and, in the event payment shall be made by the Lessee herein, Lessor does hereby agree to indemnify the Lessee and hold the Lessee harmless for any and all claims. In the event that Lessee's insurance company is required to make payment therefor, then, and in that event, the insurance company shall be subrogated to the rights of the Lessee against the Lessor herein.

3. LESSOR agrees that the LESSEE shall withhold payment of any and all sums then or thereafter due the LESSOR to the extent of such expense and claims until the determination of such expense and valid claims which amount shall be deducted to the satisfaction thereof.

4. LESSEE has the right to interline and interchange this leased equipment with other common carriers for purpose of transportation on their authorized routes pursuant to the rules and regulation of the Interstate Commerce Commission.

5. LESSOR agrees that during the term of this lease the motor vehicle equipment described above shall be under

such control of the LESSEE as required by the rules and regulation of the Interstate Commerce Commission and for the limited purpose of safety to the public and safe delivery of shipment.

6. LESSOR agrees that he will comply with the terms and conditions of the bills of lading covering the movement and transportation of the shipment.

LESSOR is responsible for his employees compliance with this article.

7. LESSOR agrees to be fully responsible for the above described equipment maintaining said equipment in accordance with the "safety" regulations and specifications set forth by the Interstate Commerce Commission to keep said equipment in good operating condition and appearance; to maintain such records as shall be required by the Interstate Commerce Commission, Government, State, or any other regulatory authority. LESSOR agrees to provide at his sole and own expense all necessary oil, gasoline, fuel, tires, repairs, accessories, and/or other items required for the operation and maintenance of said vehicle during the term of this lease.

LESSEE may require the LESSOR to store his equipment when not in use on the LESSEE's premises.

8. LESSOR agrees to maintain fire, theft, collision and bobtail insurance covering the above described equipment, and to be solely and fully responsible therefor. All insurance coverage must meet any insurance requirements prescribed by any federal or state regulatory agency. LESSOR is responsible for securing and maintaining his own insurance. LESSOR agrees to furnish LESSEE at the LESSEE's request a copy of a certificate of insurance covering his motor vehicle equipment.

9. LESSOR agrees that during the term of this lease:

(a) He will be solely responsible for the payment of his own Social Security Taxes, Old Age Benefits, Unemployment Compensation Taxes, Workmen's Compensation Insurance, Federal Income Taxes, license fees, and payment of all payroll deductions and taxes for employees furnished by the LESSOR.

(b) To pay fines, costs and expenses incurred in the operation of the equipment leased herein in the performance of this lease are to be borne by and be the sole responsibility of the LESSOR.

(c) To indemnify LESSEE against loss or liability, if any resulting from the injury or death of the driver or drivers of the vehicle above described or any helpers employed by such drivers in connection with the loading or unloading of said vehicles.

(d) To indemnify LESSEE against any loss or damage resulting from the negligence, incompetence or dishonesty of said drivers or helpers.

(e) To indemnify LESSEE against any loss or damage to or destruction of the trailer or other such equipment of the LESSEE towed by the LESSOR or his employee.

(f) To indemnify the LESSEE against any loss resulting from claims brought against the LESSEE for any property damage and bodily injury sustained by the public while the tractor is detached from a trailer.

10. LESSOR agrees to pay all federal, state, county, or municipal taxes including fuel tax payments, mileage tax, road tax, equipment use fees or taxes, equipment license fees, drivers' license fees, and any other taxes, fees, licenses, charges, or fines that may be assessed on its personnel, equipment, or the operation thereof.

11. The LESSOR shall perform this contract in a safe competent and workmanlike manner and shall be responsible to the LESSEE for complying and together with his employees, agents, and servants shall comply with all applicable requirements of federal, state and local government including but not limited to the rules and regulations of the Interstate Commerce Commission.

12. The LESSOR shall at its expense employ all necessary drivers, driver's helpers, and laborers who shall be experienced, competent, and qualified to carry out work to be performed by the LESSOR under this contract. Such employees shall also be qualified under and meet all the requirements of applicable federal and state laws and municipal ordinance and the rules and regulations of the Interstate Commerce Commission and other regulatory authorities.

13. It is understood and agreed that this LEASE is to remain in full force and effect for the period of time specified in Paragraph 1, unless one or more of the covenants set forth herein are breached; in that event, the party suffering or prejudiced as a result of such breach or violation of this lease may cancel this agreement forthwith. If both parties to this lease mutually agree, they may cancel this lease at any time. LESSEE may cancel this lease forthwith in the event LESSOR is involved in an accident causing a loss to the LESSEE or if LESSOR's actions in any manner cause LESSEE a loss of business.

14. LESSOR warrants that the vehicles herein listed are not subject to any existing lease and that he has the full and complete legal right to lease the said vehicle to the LESSEE herein.

15. LESSOR agrees that LESSEE may cancel this lease forthwith in the event LESSOR fails to fully comply with all ICC and State Regulatory Agency Safety Regulations.

16. Anything herein to the contrary notwithstanding neither party shall in any event be deemed to be a partner, joint venturer, associate or employee of the other in the conduct of its business nor shall either party be liable for any debts incurred by the other in the conduct of its business. The relationship of the parties during this agreement shall, at all times, be that of independent contractors.

17. LESSOR agrees that immediately upon termination of this lease it will remove all identification required by state and federal regulatory agencies which was supplied to LESSOR by LESSEE and will return said identification forthwith to the LESSEE.

18. This is the entire agreement of the parties. No alteration, amendment or future understanding shall be binding unless in writing and signed by both parties. This agreement shall be governed by the laws of the State of North Carolina. This Motor Vehicle Equipment Lease supersedes and cancels all prior agreements and leases entered into by the parties hereto.

IMPORTANT INSTRUCTIONS

19. THIS LEASE WILL NOT BE PAID UNTIL DRIVER HAS TURNED IN:

.....1. Delivery Receipts (All Waybills with not Exceptions)
.....2. Bill of Lading (If Shipment not Billed)
.....3. Original Copy of Lease (If 1 Trip or Spot)
.....4. Identification Signs (2 Signs) Number .....

.....5. Current Physical or Photo (If not on File)
.....6. Vehicle Condition Report Signed
.....7. Attached Trip Log Book Sheets
..... (a) Hours shown & Totaled

Original to Carolina Freight Carriers Corporation, Cherryville, N. C.

One copy to Owner-Lessor

One copy to Driver

One copy to Agents File

Supreme Court, U. S.
FILED
OCT 1 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION,
FOR THE USE AND BENEFIT OF
LIBERTY MUTUAL INSURANCE COMPANY,
AND
OLD REPUBLIC INSURANCE COMPANY,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JAMES L. SANDERLIN
ALEXANDER H. SLAUGHTER
ROBERT E. PAYNE
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

Counsel for Petitioner, Pitt County Transportation Company

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In The

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FOR THE USE AND BENEFIT OF
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OLD REPUBLIC INSURANCE COMPANY,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

CORRECTION OF ERROR

Pitt County hereby advises the Court of an erroneous statement in the Petition for a Writ of Certiorari previously filed herein:

At page 4 of the Petition for a Writ of Certiorari, Pitt County is described as an intrastate carrier. Counsel has recently been advised that this statement is inaccurate, though not materially so. Counsel has been advised that, at all times pertinent to this case, while Pitt County was not a generally authorized interstate carrier, it did possess limited authorization to transport goods in interstate commerce. Pitt County's authorization was limited to the fol-

lowing: (a) authority to transport shipments of fertilizer and fertilizer materials originating from Norfolk, Portsmouth or Suffolk, Virginia to points in North Carolina; (b) authority to transport shipments of farm drain tile pipe and fittings originating from Milledgeville, Georgia and Richland County, South Carolina to points in that part of North Carolina on, and east of, United States highway number one; and (c) authority to transport shipments of flakeboard originating from Farmville, North Carolina to points in Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, eWst Virginia and the District of Columbia.

The Trip Lease, which was incorporated by reference in the pleadings, establishes that the operation of the equipment in this case was for the purpose of transporting a shipment which originated in New York, New York with a destination in Pampano Beach, Florida. Therefore, the use of the equipment to transport goods in interstate commerce was, at all times pertinent hereto, pursuant to Carolina's authorization and license as an interstate carrier and not pursuant to Pitt County's limited authorization as set forth above. Thus, insofar as this case is concerned, Pitt County was not an authorized carrier and was, in effect, an intrastate carrier; and, the legal issues are not affected by Pitt County's limited authorization to transport shipments of certain specified goods originating from certain specified geographical locations to other specified geographical locations.

ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

The basic and dispositive issue in this case is whether the indemnity provisions of the Trip Lease are void and

unenforceable as against public policy because those provisions violate a federal regulation issued by the Interstate Commerce Commission in the regulation of interstate commerce.

Relying on the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132 (1972), Pitt County contended that the indemnity provisions in the Trip Lease were void and unenforceable as against public policy because those provisions did violate such a regulation. Accordingly, Pitt County moved for judgment on the pleadings, and the United States District Court for the Eastern District of Virginia, also relying on the decision in *Alford* v. *Major,* and treating Pitt County's motion as a Motion for Summary Judgment, granted the motion and dismissed Carolina's claim for indemnity. On appeal, the United States Court of Appeals for the Fourth Circuit attempted to distinguish the instant case from the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* and after so doing reversed the district court's decision and remanded the case for trial.

Significantly, Carolina's Brief in Opposition actually eradicates the attempt of the decision below to distinguish this case from the decision in *Alford* v. *Major, supra,* and admits that Carolina's claim for indemnity cannot stand.

In its Brief in Opposition, Carolina admits that it is entitled to indemnity under the Trip Lease only if the driver of the leased vehicle is the agent of Pitt County while operating the leased vehicle. However, if the driver was Pitt County's agent in the operation of the leased vehicle, then both the driver and the leased vehicle were under the control of Pitt County, and if the driver and the leased vehicle were under the control of Pitt County for

the duration of the Trip Lease, Carolina has clearly violated the regulation.

The regulation is clear and mandatory. It requires that the Trip Lease "[s]hall provide for the exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto by the lessee [here, Carolina] for the duration of said contract, lease or other arrangement. . . ." 49 C.F.R. § 1057.4(a)(4); see Appendix G at p. 29a.

Carolina's theory, and the decision of the United States Court of Appeals for the Fourth Circuit, assume that Carolina has complied with the regulation because the language on the front side of the Trip Lease states that Carolina is to be in exclusive possession, control and use of the leased equipment and that Carolina is to assume complete responsibility with respect to the possession, control and use of that equipment for the duration of the Trip Lease. However, that assumption is convincingly, if not irrefutably, rebutted by Carolina's argument in this Court that it is entitled to indemnity because Pitt County, not Carolina, was in complete control of the leased equipment through the driver.

Moreover, the decision below attempted to distinguish the decision in *Alford* v. *Major, supra,* because in that case the lessee "conceded a *prima facie* violation of the regulation in that the lessor had, in fact, retained full custody and control over the truck and driver during the term of the lease." *Carolina Freight Carriers Corp.* v. *Pitt County Trans. Co.,* 492 F.2d 243, 246 (4th Cir. 1974); see Appendix A at p. 8a. Carolina's argument in this Court completely eliminates the purported difference between this case and *Alford* v. *Major*, because Carolina's argument is a concession that Pitt County, the lessor, retained full custody

and control over the truck and driver during the term of the lease.

It is difficult to imagine how Carolina can be in exclusive possession, control and use of the equipment if the driver is, as Carolina asserts herein, Pitt County's agent and therefore under Pitt County's full and complete control. Similarly, it is difficult to imagine how Carolina can completely assume responsibility in respect to the possession, control and use of the leased equipment, if, as Carolina asserts here, the driver is Pitt County's agent and therefore under Pitt County's full and complete control. The answer is basic: Carolina cannot be in compliance with the regulation if the driver is Pitt County's agent and therefore under Pitt County's full and complete control.

Since Carolina's claim for indemnity rests upon the indemnity clause in the Trip Lease and since the indemnity clause applies only if the driver is under complete control of Pitt County, then clearly the indemnity clause must, of necessity, violate the regulation because the regulation requires Carolina to be in exclusive possession, control and use of the leased equipment and to assume complete responsibility in respect to the possession, control and use of the equipment. Under the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132, 135 (1972) and under the decision of the district court below, the indemnity provision must fall because to invoke it would permit a violation of the regulation. If the indemnity clause is not enforceable, Carolina's claim for indemnity must fail.

Carolina attempts to escape this inevitable result by asserting that, for purposes of providing a financially responsible defendant to the public, the driver is Carolina's agent and that since it has responded to an injured member of the public, the purpose of the regulation is fulfilled and there

is no bar to its claim for indemnity. However, that argument confuses the requirements of the regulation on the one hand with one of two important legislative purposes underlying the enactment of the statute under which the regulations were promulgated on the other.

By enacting 49 U.S.C. § 304(a)(3), Congress imposed on the Interstate Commerce Commission the duty "[t]o establish for private carriers . . . reasonable requirements to promote safety of operation . . . ." See Appendix G at p. 26a. Moreover, in 49 U.S.C. § 304(e)(2), Congress authorized the Interstate Commerce Commission, "with respect to the use by motor carriers (under leases, contracts or other arrangements) of motor vehicles *not owned by them*," to issue "such other regulations as may be reasonably necessary in order *to assure that* while motor vehicles are being so used *the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles.*" 49 U.S.C. § 304(e)(2), see Appendix G at pp. 26a-27a (emphasis added).

It is clear that Congress considered highway safety to be of paramount importance and that Congress determined that highway safety would be best achieved if the carrier under whose authorization the non-owned equipment was being used had full direction and control of the leased vehicles and was fully responsible for the operation of the vehicles as if the authorized carrier was, in fact, the owner of the leased equipment. See *e.g., American Trucking Ass'ns.* v. *United States,* 344 U.S. 298, 301-06 (1953).

The ICC responded to the statute, and to the intent of Congress, by promulgating 49 C.F.R. § 1057.4(a)(4) which is almost verbatim the same as the language in the statute.

It is true that one important legislative purpose was

to insure that an injured member of the public would have recourse to a financially responsible defendant in the form of the authorized carrier which could be required by the ICC to procure liability insurance inuring to the benefit of injured members of the public. However, the paramount purpose of Congress in enacting 49 U.S.C. § 301, *et seq.*, was to insure highway safety and in order to accomplish this purpose Congress sought to put an end to a practice which had, in the past, defeated the paramount purpose of highway safety. *See, American Trucking Ass'ns.* v. *United States, supra,* at 304-06; *Alford* v. *Major,* 470 F.2d 132, 135 (7th Cir. 1972).

Before the statute was enacted, authorized carriers avoided compliance with ICC regulations by delegating responsibility for compliance with those regulations to small unauthorized carriers which were not subject to ICC regulation. To eliminate this practice Congress authorized the ICC to require the carriers, under whose authorization the equipment was to be used, to be fully responsible for the leased equipment and for its operation. If Carolina's contention that the driver is under Pitt County's control, rather than under Carolina's control, is allowed to prevail, then Pitt County is in complete control of the leased equipment, and Carolina, by delegating responsibility for compliance with the ICC regulations to Pitt County will be permitted to engage in one of the practices which Congress sought to eliminate by enacting the statute upon which the regulation is based.

An examination of the entire Trip Lease confirms that Carolina has indeed attempted to shift its responsibility to Pitt County and that the indemnity provision is simply the final step in the process.

First, Carolina ostensibly complied with the regulation by inserting the regulatory language to the effect that it

leased the equipment "for its exclusive possession, control and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Lease Agreement . . . ." *See* Replacement Appendix F at p. 2.

Then, on the reverse side of the lease, Carolina negated bit by bit, its ostensible compliance with the regulation. For example, paragraph 7 of the reverse side of the Trip Lease requires Pitt County, not Carolina, to maintain the equipment in accordance with ICC safety regulations, to maintain the records required by the ICC, and to keep the equipment in good operating order. Paragraph 9(b) requires Pitt County, not Carolina, to pay all fines, costs and expenses incurred in the operation of the vehicle for the duration of the Trip Lease. Paragraph 12 requires Pitt County, not Carolina, to insure that the driver is qualified in accordance with the ICC regulations. Finally, paragraphs 9(c), (d), (e) and (f) establish a comprehensive indemnification scheme by which Carolina insulates itself from any real responsibility for the operation of the vehicle.

These paragraphs serve not only to illustrate the extent to which Carolina has sought to put the real responsibility of complying with ICC regulations on Pitt County, but also to underline the fact that contractual recitation on the front page of the lease, by which Carolina purports to assume full control of the vehicle and driver, is nothing but a facade. The Trip Lease was a form document prepared by Carolina. If Pitt County was to lease its equipment to Carolina, it was required to do so under the terms of Carolina's lease or not at all. Thus, in order to lease its equipment, Pitt County was required to acquiesce in the facade.

Indeed, Carolina's argument that it is entitled to indemnity because the driver was Pitt County's agent in the operation of the vehicle is nothing more than an admission that its ostensible compliance with the Interstate Commerce

Commission regulations on the front page of the lease was a mere formality.

However, the lessee's claim for indemnity based upon this same contention was explicitly rejected by the district court in *Alford* v. *Major,* 314 F.Supp. 979 (N.D. Indiana 1970), wherein the court held that:

> "Major [here, Carolina] will not be permitted to escape liability by pleading that his compliance with the regulations of the Interstate Commerce Commission was a mere formality, and that control was in fact exercised by Carriers [here, Pitt County]. The Court therefore holds that the indemnity agreement in this lease between Major and Carriers is void as contrary to public policy." *Id.* at 983.

Major appealed the district court's decision and in *Alford* v. *Major,* 470 F.2d 132(7th Cir. 1972), the Court of Appeals affirmed the trial court's decision and held that the indemnification clause in the Trip Lease was unenforceable. On appeal, Major, as does Carolina in this case, contended that the only purpose of the ICC regulations was to tender a financially responsible defendant to the public and that the indemnification clause did not infringe upon that purpose. The Court specifically rejected this argument holding that:

> ". . . Major [here, Carolina] has misunderstood the policy behind these regulations. While it is true that one of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public, this was certainly not the exclusive purpose of the regulatory scheme. Indeed, highway safety must be considered to have been one of the paramount goals. As we have seen, the regulations call for the inspection of non-owned equipment by the authorized carrier when he takes possession as well as the testing of the driver's familiarity with various

federal highway safety regulations. Thus, as the district court held, *'the intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.'* " *Id.* at 135 (emphasis added).

Major then asserted, as does Carolina in this case, that actual control of the leased equipment was in the lessor [here, Pitt County] through its driver. The Court specifically rejected this contention and stated that:

> "Major's argument [like that of Carolina in this case], of course proceeds from the premise that the actual care custody and control of the truck remained with the lessor [here Pitt County] through its driver during the period of the trip lease. Major's related suggestion that the regulations have tacitly acknowledged the practicalities of this situation runs counter to the principal thrust of those regulations. When carefully analyzed, Major's argument would permit the 'practicalities' to override one of the central purposes of the regulations; namely, the prevention of traffic accidents from interstate truck leasing operations. *Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable.*" *Id.* (emphasis added).

The Court of Appeals for the Seventh Circuit in *Alford* v. *Major, supra,* recognized what the Court of Appeals for the Fourth Circuit in this case has failed to recognize: that the indemnity provision applies only if actual care, custody and control of the leased vehicle remained with the lessor [here, Pitt County] through its driver and that if the actual care, custody and control remained with the lessor

rather than with the lessee as required by the Interstate Commerce Commission regulations then the lessee [here, Carolina] is permitted to circumvent the regulation. Therefore, the indemnity provision is void and unenforceable because it is in direct conflict with the regulation.

The pleaded facts in this case are almost identical to the facts before the court in *Alford*. In both cases, the party required to do so by the ICC has executed a *pro forma* assumption of responsibility for the equipment and driver, but in each case, the lessee [here, Carolina] has attempted to shift the responsibility for complete control of the truck and driver to the lessor [here, Pitt County]. That responsibility is imposed upon the lessee [here, Carolina] by federal regulations having the force and effect of law and cannot be avoided by a contractual provision which conflicts with, and actually defeats, the very purpose of the regulation. Moreover, in each case, the device for attempting to avoid that responsibility is the same. The Trip Lease seeks to make the driver the employee of the lessor [here, Pitt County], and then, by way of the indemnification clause, seeks to make the lessor responsible for the acts of the driver. It is this device that frustrates the federal regulation. The final step in the process is the indemnification clause which shifts the ultimate responsibility of complying with the regulation to the lessor in direct violation of the federal regulation. Accordingly, the indemnification clause is unenforceable.

This is the clear and unmistakable holding in the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major, supra.* The decision of the United States Court of Appeals for the Fourth Circuit must necessarily be in direct conflict with the decision in *Alford* v. *Major, supra,* because the decision of the United States Court of Appeals for the Fourth Circuit holds that

the indemnification provisions are not facially violative of the regulation. Yet, because the indemnification provisions become operative only if the driver is the agent of Pitt County, and therefore under its full and complete control in the operation of the leased vehicle, the indemnification provision is, in fact, facially violative of the regulation which requires that full and complete control of the operation of the vehicle be maintained by Carolina.

The only other possible construction of the decision below is that Carolina is entitled to indemnity because it was in full custody and control of the leased equipment. However, since the indemnity provision does not operate if the driver is the agent of Carolina and since Carolina admits that its claim for indemnity exists only if the driver is Pitt County's agent, that cannot be the meaning of the decision of the United States Court of Appeals for the Fourth Circuit. Thus, that court's decision must proceed from the premise that a provision which becomes operative only if the driver, and the equipment through the driver, is under the complete control of Pitt County is not in direct conflict with the regulation which requires that such control be in Carolina. Thus, the Court of Appeals for the Fourth Circuit has decided that simply because Carolina has fulfilled one of the two purposes underlying the enactment of the regulations and the statute by responding to an injured member of the public, the regulation can thus be waived.

Therefore, when carefully analyzed, the decision of the United States Court of Appeals for the Fourth Circuit in this case is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Alford* v. *Major, supra*. This conflict exists as to an important question of federal law relating to the regulation of interstate commerce. Trip leases and indemnification clauses

such as those contained in the instant case are common throughout the trucking industry. The parties to those leases should not be left to guess at whether such a contractual provision is valid.

CONCLUSION

Accordingly, for the reasons stated herein and in the Petition for a Writ of Certiorari, it is respectfully requested that this Court, in the exercise of its discretion, grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

/s/ ALEXANDER H. SLAUGHTER

JAMES L. SANDERLIN
ALEXANDER H. SLAUGHTER
ROBERT E. PAYNE
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
Counsel for Petitioner, Pitt County Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply to Brief in Opposition were mailed, postage prepaid, to Edward A. Marks, Jr., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Richmond, Virginia 23219, counsel for respondent Carolina Freight Carriers Corporation, and to James W. Morris, III, Browder, Russell, Little, Morris & Butcher, 1510 Ross Building, Richmond, Virginia 23219, counsel for respondent Old Republic Insurance Company, on this 30th day of September, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States and that all parties required by law to be served have been served.

ALEXANDER H. SLAUGHTER

Supreme Court, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

Nos. 73-1750 and 74-54

In the Supreme Court of the United States

OCTOBER TERM, 1974

PITI COUNTY TRANSPORTATION COMPANY, PETITIONER

v.

CAROLINA FREIGHT CARRIERS CORPORATION, FOR THE USE AND BENEFIT OF LIBERTY MUTUAL INSURANCE COMPANY

AND

OLD REPUBLIC INSURANCE COMPANY

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND THE SEVENTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,

BETTY JO CHRISTIAN,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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This memorandum is filed in response to the Court's letter of October 15, 1974, inviting the Solicitor General to express the views of the United States.

STATEMENT

In both of these cases motor carriers (lessees) certificated by the Interstate Commerce Commission have sought indemnification from the lessors of equipment utilized in performing transportation services that the lessee is authorized to perform. In each case the lessee (or its insurer) paid a claim for personal injuries allegedly caused by negligence of the driver of the leased vehicle. The drivers themselves were supplied by the lessors of the equipment. In both cases written lease agreements provided that the lessor, which furnished both equipment and driver, would indemnify the lessee for any liability incurred as a result of defects in the equipment or negligence of the driver. The lessors in both cases declined to honor the indemnification clause, contending that the clause was invalid because it conflicted with the equipment lease requirements promulgated by the Interstate Commerce Commission.

The relevant Commission regulation with respect to the lease in No. 73-1750, *Pitt County Transportation Co.* v. *Carolina Freight Carriers Corp.*, provides in pertinent part (49 C.F.R. 1057.4(a)):

> *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:
>
> * * * * *
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,* * *
>
> * * * * *

The relevant Commission regulation with respect to the lease in No. 74-54, *Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Systems, Inc.*, provides that the carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *." 49 C.F.R. 1057.3(a).

In *Transamerican* the Court of Appeals for the Seventh Circuit concluded that the indemnification provisions in the lease excessively diminish the lessor's control and responsibility, and therefore are inconsistent with the Commission's regulations. In *Pitt County* the Court of Appeals for the Fourth Circuit concluded that the indemnification provisions do not violate the Commission's regulations.

ARGUMENT

1. These two cases present a clear conflict among the circuits in interpreting the relevant Commission regulations.[1] Indemnity clauses are often used in equipment leases in the trucking industry, and the present controversy about their validity has created unnecessary confusion and uncertainty for the carriers affected. We therefore believe that certiorari should be granted to resolve the conflict.[2]

2. The equipment leasing regulations under consideration here were formulated in Ex Parte No. MC-43, an extended rulemaking proceeding from 1950 to 1956. See 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. Because only a properly certificated carrier may haul freight, those regulations—although recognizing that

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[1]There is no operative difference between the control and responsibility requirements of Sections 1057.3(a) and 1057.4(a)(4). Section 1057.4 includes additional requirements, not relevant to the indemnification controversy, from which Section 1057.3(a) exempts certain carriers.

[2]The Fifth Circuit (see *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710) also has held that indemnification clauses are permissible.

properly certificated carriers legitimately may lease motor vehicle equipment from others in order to operate to the full extent of their authorities—prevent carriers from entering into ostensible "equipment leases" under which a "lessee" with operating authority simply lends its name and its certificate to a "lessor" that actually performs the transportation service. The control and responsibility regulations forbid such arrangements, which in reality constitute illegal leasing of operating authority from the "lessee" of the equipment to the "lessor" of the equipment (*Performance of Motor Com. Car. Service by Riss & Co., Inc.*, 48 M.C.C. 327, 360):

> In any case of a person claiming to be a motor carrier through the use of the vehicles of others, it is of the utmost importance to regulation that it have and exercise direction and control of the operations and of the persons engaged therein. For otherwise an unworkable situation is created, that is, one, for example, in which neither the Commission nor the person claiming to be the carrier would have any immediate and direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service, and the safe operation of vehicles on the highways, all of which were intended by the act. In other words, as to these important features of motor-carrier operation, our regulation thereof, as required by the act, would be negatived to an inoperative degree, as the actual operator would not be subject to our regulations or to the direction and control of the person claiming to be the carrier and subject to our jurisdiction.

Although the regulations reflect different treatment for leases of various types of equipment, they generally require that (1) the lease be in writing and provide that the

lessee assumes control and responsibility for the operation of the equipment; (2) the lessee conduct a safety inspection before taking possession of the equipment; and (3) the equipment be identified as that of the lessee. The regulations make no provision with regard to indemnification clauses and the narrow question presented here—whether the presence of such an indemnity clause in and of itself constitutes a lack of control in the lessee—was not addressed in the rulemaking proceeding.

3. The Commission believes that its regulations neither sanction nor forbid indemnification agreements. Although the regulations require the lessee to assume full "control and responsibility," the regulations do not altogether proscribe indemnity clauses. If the lessee otherwise assumes full control and acknowledges its personal liability to the injured party, it is not forbidden to seek indemnity from the lessor. The goal underlying the regulations—the prevention of leases of operating authority in the guise of leases of equipment—is not affected by indemnification agreements where other adequate indicia of control and responsibility are present.[3]

The Commission believes, however, that an indemnity clause is a factor to be considered in determining whether

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[3]In the course of the rulemaking there was some testimony regarding the indemnification of lessees by owner-operators. The Commission stated (52 M.C.C. at 690):

> Protection of the public through insurance is reduced, because certain carriers require owner-operators to bear a portion of the public-liability and property-damage insurance, and, in some instances, to assume part of the responsibility for cargo insurance and pay a portion of each loss and damage claim.

However, the Commission's comment concerned carriers (lessees) that disclaim their responsibility for damage to the public. Such a disclaimer denegrates the lessee's control and responsibility. The Commission's comment did not discuss carriers which, while acknowledging their liability, arrange to shift the ultimate loss to the lessor.

a lessee has in fact assumed the requisite control and responsibility.[4] In two Commission cases in which the lessor's insurance policy provided that the lessor would hold the lessee free from liability, the Commission held that the "control and responsibility" requirements of the regulations were not satisfied. *Tanksley Transfer Company Extension—Points in Four States*, 110 M.C.C. 674; *Diamond Transportation System, Inc., Extension — Wisconsin and Oklahoma Origins*, 117 M.C.C. 706. However, those cases involved a number of other factors tending to show a lack of control by the lessee. The Commission in each case based its conclusion upon the cumulative impact of all of these factors and not upon the indemnification provisions alone.

4. The United States believes that the present Commission regulations with respect to leased equipment have not adequately assured the safe operation of leased vehicles. The Bureau of Motor Carrier Safety, which is responsible for ensuring compliance with safety regulations,[5] has difficulty in obtaining compliance by owner-operators who lease equipment to certificated carriers.

[4]The clauses involved in this case provide for indemnification only of damage proximately caused by the negligence of a driver provided by the lessor or by defects in the lessor's equipment. On the other hand, a clause providing for indemnity for harm caused by conditions created by the lessee, or by conditions that the lessee should have detected and cured in the course of adhering to the Commission's inspection regulations, might by itself show that the lessee has failed to assume the requisite control and responsibility.

[5]The Commission's duties relating to motor carrier safety were transferred to the Department of Transportation under Section 6(e) of the Department of Transportation Act, 49 U.S.C. 1655(e), and have been delegated to the Bureau of Motor Carrier Safety of the Federal Highway Administration, 49 C.F.R. 1.48, 389.4. However, the Commission retains authority to promulgate rules with respect to the terms of equipment leases pursuant to 49 U.S.C. 304(e).

The United States believes that appropriately drafted regulation of indemnification clauses would be desirable as a matter of policy and that the Commission has power to adopt such regulations under 49 U.S.C. 304(e). Such regulation might provide regulated carriers with a greater economic incentive to refuse to lease unsafe equipment or to implement preventive maintenance programs; as a consequence owner-operators would have a greater incentive to perform adequate maintenance in order to obtain leases. However, the United States believes that the present Commission rules cannot appropriately be interpreted as prohibiting lease provisions which require the lessor to indemnify the lessee for liability claims from members of the general public.

The Commission has never formally considered the effects an indemnity clause might have either on the care with which leased equipment is operated or on the dispatch with which injury and damage claims are paid. However, in promulgating the leased-equipment regulations the Commission expressly adopted other measures, including the inspection requirement, for the purpose of ensuring that leased equipment would be operated safely.

CONCLUSION

For the reasons stated the petitions for writs of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
Attorney.

FRITZ R. KAHN,
General Counsel.

BETTY JO CHRISTIAN,
Associate General Counsel,
Interstate Commerce Commission.

FEBRUARY 1975.

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